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A GUIDE
TO
THE LAWS OF ENGLAND
AFFECTING
ROMAN CATHOLICS.

BY
THOMAS CHISHOLME ANSTEY, ESQ.
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

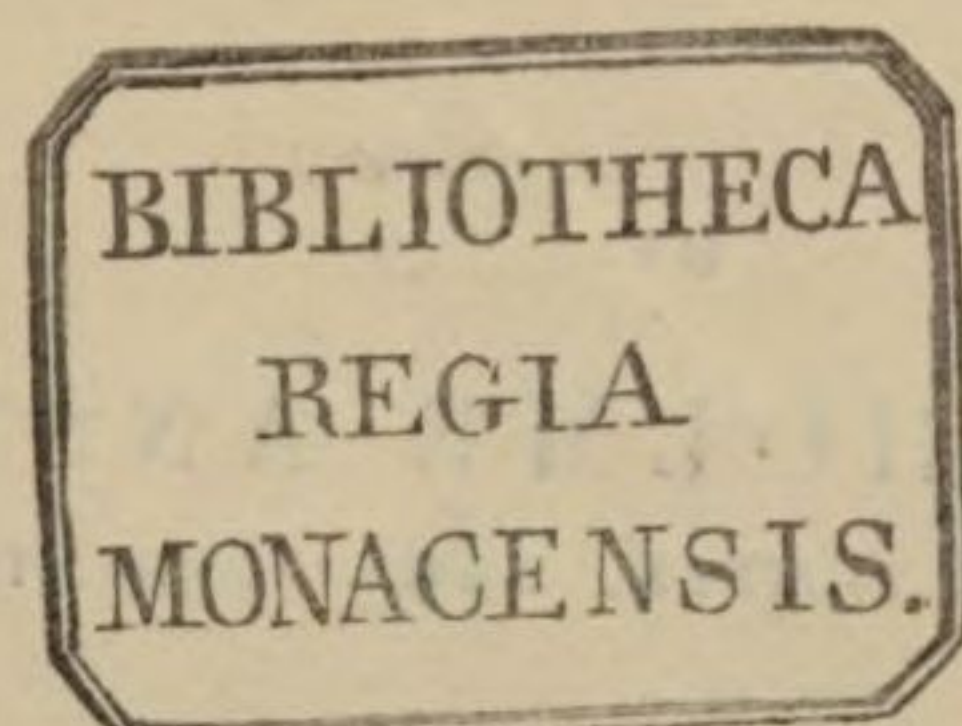
In omnibus quidem, maxime tamen in Jure, æquitas spectanda sit.

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THE LAWS OF ENGLAND



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P R E F A C E.

IN offering this Treatise to the notice of the Profession, the Author feels himself called upon to say a few words in explanation. He is far from imagining himself very competent to discharge the task he has attempted. Yet, when he considers that up to the present day there has appeared not a single work on this not unimportant subject, he ventures to hope that even this compilation may be found of service. It was the want under which he personally laboured of the means of informing himself upon the present state of the law relating to the Roman Catholic body in Britain and its colonies, that first led the Author to undertake, for his own benefit, those inquiries, the results of which he now presumes to lay before the public. In doing so, he is quite conscious of the many imperfections which are very likely to abound in a work of the first impression. But if he shall have succeeded in facilitating the further researches of more able and learned inquirers than himself, and of clearing their path of some of those embarrassments which he has found upon his own, the Author's success will have been quite equal to his expectations.

As far as the Author is aware, he has endeavoured never to make use of the industry of other compilers without acknowledgment. For the concluding Chapter upon Colonies, he is especially responsible. The silence

of Mr. Justice Story, Mr. Burge, and other learned commentators, upon this interesting point in the conflicts of imperial with local laws, has been frequently lamented by those to whom some information would have been particularly desirable.

Where so much doubt exists as to the present applicability of certain ancient statutes and supposed legal maxims, the Author feels every confidence in craving, as he does, the indulgence of his readers for the views he has occasionally expressed. He more especially refers to the Chapters on Charities.

It has been a rule with him to confine his work, as much as possible, to the laws peculiarly, and *eo nomine*, affecting the Roman Catholics. Circumstances have occasionally created exceptions to this rule. To some laws nonconformists of every denomination are equally subject. In other instances, and particularly in that of the law of Charities, it was difficult to adhere to the rule without incurring the hazard of not being sufficiently understood. Perhaps he has acted wisely in deserving the censure of prolixity, rather than the self-reproach of the poet:—

———— Brevis esse laboro ;—

Obscurus fio.—

T. C. A.

1, Plowden Buildings, Temple,

May 3rd, 1842.

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advowsons; while section 1, which avoids all acts done by papists in exercise of certain common law and statutory rights, and section 9, which declares the Universities entitled to sue in *quare impedit*, under certain designations, include also schools, hospitals, and donatives.

It will be observed, that the Roman Catholic patron is only disabled to present. It has been decided, that as to all other purposes he continues patron, and therefore that he shall confirm the leases of the incumbent, &c. (*m*).

Where the advowson is vested in tenants in common, of whom only one is a Roman Catholic, the other and not the University shall present upon a vacancy; and the bishop shall exercise the discretion he in general possesses, where one alone of two tenants in common presents, by admitting and inducting the Protestant tenant's clerk (*n*).

If the right of presentation to a vacant ecclesiastical benefice belong not to the Roman Catholic, personally, but as attached to some office held by him under the Crown, the Archbishop of Canterbury shall exercise the right for every such turn, and not the Universities. (10 Geo. IV. c. 7, s. 17.)

If an advowson or avoidance belonging to a Roman Catholic come into the Queen's hands by reason of outlawry or conviction of recusancy, or any other forfeiture, the Queen, and not the University, will be the proper party to present (*o*).

Before the 5 & 6 Will. IV. c. 76, many corporations were seised, in their corporate capacity, of advowsons and rights of presentation to benefices and ecclesiastical preferments. By the 139th section of that Act, as explained by the 6 & 7 Will. IV. c. 77, s. 20, it was enacted that all such hereditaments so vested in the

(*m*) Bacon's Abridgment, *Papists* *eter and another*, 5 Bing. N. C. 652; (C.), s. 6. Co. Litt. 186, (*b*).

(*n*) *Edwards v. The Bishop of Ex-* (*o*) Hob. 126; Moor, 372.

corporations should be sold, under the direction of the Ecclesiastical Commissioners of England and Wales; and that, in the mean time, the Ordinary of the diocese should nominate to all vacancies. The 1 & 2 Vict. c. 31 extends the provisions of this Act to certain nominations not originally within it: and it has received a large construction in the recent case of *Hine v. Reynolds* (*p*). However, as those enactments are in terms confined to cases of a seisin by corporations in their corporate capacity, and not as "Charitable Trustees," it may still be useful to bear in mind, that no Roman Catholic member of any lay body corporate can "give any vote at, or in any manner join in the election, presentation, or appointment of any person to any ecclesiastical benefice whatsoever, or any office or place belonging to, or connected with, the United Church of Great Britain and Ireland, or the Church of Scotland, being in the gift, patronage, or disposal of such lay corporate body." (10 Geo. IV. c. 7, s. 14.)

Crown Advisers.

It is a high misdemeanour, for any Roman Catholic directly or indirectly to advise Her Majesty, her heirs or successors, or the Guardians or Regent of the realm, or the Lord Lieutenant or Lord Deputy, or Chief Governor or Governors of Ireland, touching the appointment to or disposal of any office or preferment in the United Church of England and Ireland, or in the Church of Scotland. The offender upon conviction is for ever disabled from holding any office, civil or military, under the Crown. (10 Geo. IV. c. 7, s. 18.)

Secretaries of State's Licenses.

A Roman Catholic Secretary of State is not empowered to grant written licenses to Jesuits and Regulars to enter the realm. (10 Geo. IV. c. 7, s. 31.)

(*p*) 2 Scott, N. R. 394; 2 Mann. & G. 71.

Abjuration Oath.

Any Roman Catholic refusing or neglecting to take the oaths of allegiance and abjuration, specified in the 6 Geo. III. c. 53, s. 1, when duly required so to do by at least two justices of the peace, or by any person or persons specially appointed by Her Majesty to administer the same, by Order in Council or Commission under the Great Seal, shall, from the time of his neglect or refusal, be deemed a Popish recusant convict, and, as such, shall forfeit and be proceeded against. (1 Geo. I. st. 2, c. 13, s. 10.) See *suprà*, p. 4.

Public Worship.

No Roman Catholic place of congregation, or assembly for religious worship in England, is permitted or allowed at law, unless the place of such meeting has been certified to the General or Quarter Sessions, and recorded there; (31 Geo. III. c. 32, s. 5); or to the bishop of the diocese, or to the archdeacon of the archdeaconry; (52 Geo. III. c. 155, s. 2; extended to Roman Catholic places of worship by 2 & 3 Will. IV. c. 115, s. 1). No person in holy orders, or pretended holy orders, whether as a "priest, or as a minister of any other higher rank or order," shall perform any ecclesiastical function, or officiate in any such place of meeting, unless his own name and ecclesiastical description shall have also been recorded at the General or Quarter Sessions. The penalty upon a person so officiating "in any such place of meeting, not so recorded as aforesaid," is an entire exclusion of the offender from the benefit of the Relief Act, "for any purpose whatever." (31 Geo. III. c. 32, s. 5.) This deprivation of benefit, (in itself a severe punishment, as we shall perceive when we come to the laws in force against nonjuring Catholics,) is not the only one to which these defaulters are liable. The disobedience of an Act of Parliament is in itself a misde-

meanour, punishable by fine and imprisonment (*q*). And the extended Act of the 52 Geo. III. c. 155, enacts (s. 2), that every person who shall knowingly permit or suffer any congregation or assembly to meet for religious worship, (at which more than twenty persons, besides his family and servants, shall be present,) in any place occupied by himself, before he shall have certified the same as aforesaid, shall forfeit for every offence a sum not exceeding 20*l.*, nor less than 20*s.*, at the justices' discretion; and that every person teaching and preaching upon such premises, without the consent of the occupier, shall forfeit a sum, at the like discretion, not exceeding 30*l.*, nor less than 40*s.* (s. 2.) No Roman Catholic ecclesiastic whatever is within the protection of the 31 Geo. III. c. 32, who shall not have taken the oath appointed by law *previously to his officiating or exercising his functions.* (s. 11.) This special oath seems to have been intended in substitution for the general one appointed to be taken by Catholics at large, but for which no particular time had been prescribed by the statute. The same section puts out of all benefit from this remedial law, all Roman Catholic ecclesiastics officiating in any place of congregation or assembly for religious worship permitted by the Act, "with a steeple and bell," or at any funeral in any church or churchyard, or exercising any rites or ceremonies of his religion, or wearing the habits of his order, *save within some place of congregation or assembly for religious worship permitted by the Act, or in a private house, where there shall not be more than five persons assembled, besides those of the household.* In addition to this liability, it has been since enacted, that if any Roman Catholic ecclesiastic, or member of any religious order, community, or society, of the Church of Rome, shall exercise any rites or ceremonies of Roman Catholic religion, or wear the habits of his order, "save within the

(*q*) Com. Dig. tit. *Indictment* (D).

usual places of worship of the Roman Catholic religion, or in private houses," he shall, upon conviction, forfeit for each offence the sum of 50*l*. (10 Geo. IV. c. 7, s. 26.) Roman Catholics assembled in any place for religious worship, with locked or bolted doors, are also excluded from the benefit of the Act, notwithstanding their having taken the oath prescribed at law. (31 Geo. III. c. 32, s. 6.) And the meeting for religious worship with doors locked, bolted, or barred, or otherwise fastened, so as to prevent any persons entering therein, is positively forbidden by the 11th section of the 52 Geo. III. c. 155 above mentioned, under a penalty on the person teaching or preaching there, for every such meeting, of any sum not exceeding 20*l*., nor less than 40*s*., at the discretion of the justices.

Unless Roman Catholics come upon the Lord's Day to some congregation or assembly of religious worship registered under these Acts, all the laws for frequenting the service of the Established Church are still to be enforced against them. (31 Geo. III. c. 32, s. 9; 52 Geo. III. c. 155, s. 4.)

No Roman Catholic holding any judicial or civil office, or being mayor, provost, jurat, bailiff, or other corporate officer, shall "resort to or be present at" any place or public meeting for religious worship in England or Ireland, other than that of the Established Church, in the robe, gown, or other peculiar habit of his office, or with the ensign or insignia of his office. The penalty on conviction, for this offence, is forfeiture of office, and for every distinct act a fine of 100*l*. (10 Geo. IV. c. 7, s. 25.)

Schoolmasters, Tutors, &c.

No Roman Catholic is allowed to keep a school for the education of youth, until the name of the master or mistress of such school, and his or her description as "Roman Catholic," shall have been recorded at the General or Quarter Sessions of the Peace for the place

where the school is situate. Persons offending are of course guilty of a simple misdemeanour, (*ante*, p. 20); but they are also by express provision deprived of all benefit under the Relief Act of the 31 Geo. III. c. 32, by the 16th section of that Act. As this section includes schoolmistresses, it is plain that communities of female religious devoted to the education of youth are within its scope. It is a great mistake to suppose that female communities are in general protected by the law. The 37th section of the 10 Geo. IV. c. 7, only exempts them from the new penalties and the new relief introduced by that Act. And the 17th section of the 31 Geo. III. c. 32, expressly maintains the law then existing against religious orders or societies of "persons bound by monastic or religious vows," without any distinction of sex.

No Roman Catholic schoolmaster shall receive into his school for education the child of a Protestant father. (31 Geo. III. c. 32, s. 15.) This enactment is confined to *masters* of schools, and to children whose *fathers* are Protestant.

The Act of 2 & 3 Will. IV. c. 115, was passed to extend, to the Roman Catholics of Great Britain, the laws relating to English Protestant Dissenters, in respect to their schools and places for religious worship, education, and charitable purposes, "but not further or otherwise." It is conceived, therefore, that the laws relating exclusively to the personal rights and liabilities of those employed in the instruction of Dissenting youths, are not extended by this enactment to the Roman Catholics, and that the provisions contained in the 31 Geo. III. c. 32, for the registering of masters and mistresses, and for restraint of education in the case of children of a Protestant father, are still in force. Yet the language of the clause in question is very ambiguous. Professing to extend the laws to which Protestant Dissenters are subject, "not further or otherwise" than in respect to schools, places of worship, education, and charity, it ends by extending them to Roman

Catholics, not only in respect to these places, but also to "the property held therewith, and the *persons employed in or about the same*." And yet the preamble recites the purpose of the enactment to be merely the removal of doubts as to the capacity of British Catholics to acquire and hold "property necessary for religious worship, education, and charitable purposes." It may, therefore, be even doubted whether the Act has operated to extend to the Roman Catholics any of the laws affecting Dissenters that do not strictly relate to the tenure of property held in trust for their spiritual, educational and other charitable purposes, or whether also the provisions for certifying Dissenting chapels, and keeping them open during the celebration of worship, with the penalties consequent on their breach or neglect, are not extended to Roman Catholic congregations. (*Suprà*, p. 19.)

Church Government and Clergy.

Any person, not authorized by law, who shall have assumed or used at any time after the 23rd of April 1829, the name, style, or title of Archbishop of any province, Bishop of any bishopric, or Dean of any deanery, in England or Ireland, shall for every such offence forfeit the sum of 100*l*. (10 Geo. IV. c. 7, s. 24.) This enactment is confined to cases of assumption or user by the prelates themselves. There is nothing to prevent their being so styled by others, or even addressed. And it is conceived that under this section, even in a clear case, it will be often difficult to sustain the charge of assuming or using the name, style, or title in question. Nothing short of the literal expression "Archbishop," or "Bishop," or "Dean," with the true addition of the locality, as "York," &c., would seem to satisfy that jealous distrust with which the courts regard new penal enactments.

We have already seen that by section 26 of the same Act, the penalty of 50*l*. for every offence is imposed where

any Roman Catholic ecclesiastic, or member of a religious order or community of men, shall, after the same date, have exercised Roman Catholic rites or ceremonies, or worn the habits of his order, "save within the usual places of worship" of his religion, or "in private houses." (*Vide supra*, p. 21.)

Religious in General.

By the 31 Geo. III. c. 32, it was expressly declared that the relief afforded by that Act was not to be taken to warrant the foundation, endowment or establishment of "any religious order or society of persons bound by monastic or religious vows within these realms, or the dominions thereunto belonging, and that all uses, trusts, and dispositions, whether of real or personal property, which, immediately before the 24th day of June, 1791, shall be deemed to be superstitious or unlawful, shall continue to be so deemed and taken, any thing in this Act contained notwithstanding." (s. 17.) The words here used are clear and comprehensive. They embrace religious communities in general, of whatever sex the inmates may be. They forbid the future foundation, endowment, or establishment of such, and declare that, in regard of all such communities, whether then existing or to exist, the laws against superstitious or unlawful uses shall continue undisturbed. But in other respects the members of such bodies were not prevented from qualifying themselves to take the benefit of the relief conferred upon Roman Catholics generally by the Act. The fourth section expressly mentions members of *ecclesiastical orders or communities*. A later enactment (10 Geo. IV. c. 7) has made an important addition to the severities of the law, as it affects male Roman Catholics being members of religious communities or societies bound by vow. The general liabilities of female religious having been excepted, by section 37, from the operation of the Act, their rights and

liabilities, in respect of person and property, remained precisely the same as the provision above cited, from the 31 Geo. III. c. 32, had left them. What their actual rights of property are since the passing of the 2 & 3 Will. IV. c. 115, we shall see hereafter. But those female religious who are engaged in the instruction of youth, and who have not certified themselves to the Quarter Sessions, are also liable to the special disabilities and penalties enacted at an earlier period against schoolmasters and schoolmistresses of the Roman Catholic religion. (See p. 22.)

Jesuits and Male Regulars.

The preamble of the 28th section of the 10 Geo. IV. c. 7, recites, that "Jesuits and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom," and proposes "to make provision for the gradual suppression and final prohibition of the same therein." It is then enacted, that every Jesuit and Regular resident, on the 23rd of April, 1829, within the United Kingdom, shall, within six months after that day, deliver to the clerk of the peace of the place of his residence, to be registered, (and a copy to be transmitted to one of the Secretaries of State, if his place of residence be within Great Britain,) a written statement of his name, age, birth, order or community, and residence, and of the name and residence of his immediate religious superior in the community. The penalty of disobedience is to be a fine of 50*l.* to the Crown, for every month of residence without delivering such written statement. If a natural born subject of this realm, being on the 23rd of April, 1839, a Jesuit or Regular, shall, on that day, have been out of the realm, and shall afterwards come into the realm, he is required by the 30th section to deliver to the clerk of the peace for his place of residence such written

statement as aforesaid, within six months of his arrival in the realm, under the like penalty of 50*l.* a month for neglect. Such Jesuits and Regulars as have been registered under these two sections of the Act, are allowed to remain in the realm, without further hindrance; except so far as they are affected by the general provisions of the 31 Geo. III. c. 32, noticed at page 24. Any Secretary of State, being a Protestant, is empowered by the 31st section to grant a written license under his hand to any other Jesuit or Regular to come into the realm, even after the 23rd of April, 1829, and to remain there for any period not exceeding six calendar months. An annual account of each year's licenses shall be laid before Parliament, (s. 32). Any Secretary of State may revoke any such license before the expiration of the time therein specified. The party to whom it was granted must quit the realm within twenty days after its expiration, or notice of its being revoked. If he fail to do so, he shall be deemed guilty of a misdemeanour, punishable on conviction by banishment for life, (s. 31).

If any Jesuit or Regular, not being a natural born subject, and not having a Secretary of State's license, shall have come into the realm after the 23rd of April, 1829, he is guilty of a misdemeanour, punishable by banishment for life, (s. 29). The same punishment is enacted for the offence of being admitted or becoming a Jesuit, or brother or member of any other such religious order, community, or society within the realm, after the 23rd of April, 1829, (s. 34); and by s. 33, the Jesuit or Regular so admitting him, or administering the vows or oaths to him, or assisting at their being administered, "shall, in England, be deemed guilty of a misdemeanour," punishable, it is apprehended, as a simple misdemeanour, by fine and imprisonment, no specific punishment being mentioned in this section.

If any Jesuit or Regular, sentenced and ordered to banishment under either of the above provisions, shall

not have departed from the realm within thirty days after receiving his sentence and order, the Queen is empowered, by the 35th section, to cause him to be conveyed to any place beyond the realm, directed by Her Majesty in Privy Council. And the 36th section provides, that if any Jesuit or Regular, sentenced and ordered to banishment under this Act, shall be found at large within the realm without lawful cause, after the end of three calendar months from the time of his sentence and order, such offender, on conviction, shall be sentenced to transportation for life.

It is scarcely necessary to repeat that with such qualifications as are introduced by these sections of the 10 Geo. IV. c. 7, the provisions of the 31 Geo. III. c. 32 are applicable to Jesuits and male religious orders and communities, no less than to female religious communities. The disabilities imposed by the more modern of these Relief Acts are cumulative to those enacted by its predecessor, and to those which it found in existence, but did not repeal.

Dissuading from Church, &c.

The 35 Eliz. c. 1, s. 1, continued by 3 Car. I. c. 4, and 16 Car. I. c. 4, imposed the penalty of imprisonment, without bail or mainprize, until conformity to the established worship, upon nonconformists who should incite others to forbear coming to the services of the Established Church. The Commissioners of Criminal Law^(r) express doubts as to this enactment having been repealed in favour of Roman Catholics. It seems to the author, that there is scarcely any ground of doubt. The Act speaks only of nonconformists "without any lawful cause," who shall persuade, &c. Roman Catholics have lawful cause of nonconformity, if they have qualified under their Relief Acts. Still the opinion of the Commissioners

(r) Sixth Report, p. 110 (n).

being too respectable to be passed over, the author thinks it right to give it in their own words. "None of the Roman Catholic Toleration Acts make any mention of the 35 Eliz. c. 1, s. 1, or describe the offences therein contained. These offences consist in the inciting of others, *by a person who obstinately refuses to repair to church*, to abstain from going there, or to frequent unlawful places of worship, &c. Unless, therefore, it should be held that a Roman Catholic who takes the oath appointed by the Roman Catholic Relief Act, and resorts to a registered place of worship, is not a person obstinately refusing to repair to church, it would seem that there is no mode under the existing law, by which a Roman Catholic who commits any of those offences can avoid the penalties."

CHAPTER IV.

PARTICULAR DISABILITIES OF ROMAN CATHOLICS IN
ENGLAND, NOT BEING QUALIFIED AT LAW.

AMONG the provisions of the Relief Acts, mitigating the ancient rigour of the penal code, there are very few which are not made to depend on the fulfilment of certain conditions. In almost every case the Roman Catholic desirous of taking the benefit of the remedial enactment must be, at least, ready to subscribe the oath appointed to persons of his persuasion. In some cases, even that subscription must precede the exercise of the liberty acquired under the Act. Priests, members of the legal profession, &c., are, as we have seen, instances of this rule. Nor is the oath, in every case, the only condition necessary to qualify Roman Catholics to enjoy the benefit of the Relief Acts. We have seen that a mere omission in procuring a return to be made or a register to be recorded, not to speak of the more important acts of commission prohibited by legislative enactment, will, in not a few cases, deprive the party of relief just as effectually as though he had omitted the oath itself. We have also seen, that although the consequences of neglecting or refusing to take the oaths of allegiance and abjuration under the 1 Geo. I. st. 2, c. 13, s. 10, do not involve all the consequences of a want of qualification under the Relief Acts, yet that they amount to no less than the grave penalties on popish recusancy after conviction. In treating of the disabilities, therefore, to which non-juring Roman Catholics are particularly liable, we must bear in mind that other Roman Catholics, not qualified in other respects under the Relief Acts, are liable to

those disabilities equally with nonjurors. Others, whether qualified or not, who by preaching, teaching, or writing, shall gainsay the Catholic Relief Oath, or any of its declarations or doctrines, are in like manner excluded. (31 Geo. III. c. 32, s. 12.) Others again, independently of the Relief Acts, may become liable to the penalties and forfeitures of recusancy at least, even at this day. They will be conveniently considered in the same division of this treatise.

I.—HIGH TREASONS.

Nonjuring and unqualified Roman Catholics are still liable to capital and other punishments as traitors, under certain unrepealed statutes. The first in order is the famous Act of Supremacy, 1 Eliz. c. 1. By the 27th section of that Act, the pain of forfeiture of goods and chattels, real as well as personal, and also a year's imprisonment without bail, by the 28th section, in all cases where the amount of forfeiture is less than the value of 20*l.*,—and the forfeiture of all ecclesiastical benefices, &c. by the 29th section, where the offender is a spiritual person,—are incurred by the having, within six months before the indictment being preferred (s. 31), affirmed, maintained, or defended, advisedly, maliciously, and directly, whether in writing or print, by words, deed or act, the spiritual or ecclesiastical authority, pre-eminence, power or jurisdiction of any foreign prince, prelate, person, state or potentate theretofore claimed, used or usurped within the realm, or any dominion or country that was within or under the power, dominion or obeisance of Elizabeth; or even the putting in ure or executing any thing for the purpose of such maintenance or defence, if done advisedly, maliciously, and directly. It is then provided, by ss. 29 and 30, that upon conviction of a second offence, the culprit shall incur the dangers, penalties, and forfeitures of a *præmunire*, and upon conviction of a

third offence, shall be deemed guilty of high treason, and suffer pains of death and other penalties, forfeitures, and losses, as in cases of high treason by the laws of this realm.

The next statute, 5 Eliz. c. 1, expressly names the Roman Pontiff, and enacts, (s. 2,) that if any of the subjects of the realm should be convicted of having, within a year previously, "by writing, ciphering, printing, preaching, or teaching, deed or act," advisedly and wittingly held, extolled or defended the formerly usurped power or authority of the Bishop of Rome, or of his see within the realm, or any of Queen Elizabeth's dominions or countries, or having by speech, deed, or act, advisedly and wittingly attributed such to that see or any of its bishops, such offenders, with their abettors, aiders, and comforters, should incur the penalties of premunire. The same punishment is imposed by s. 8, for declining to take the Oath of Supremacy, within a year before conviction. A second conviction, whether under s. 2 or s. 8, is, by s. 11, made punishable as high treason, but in this case without corruption of blood, (s. 12).

The decisions under these Acts have very greatly extended their application. It has been holden, that the mere act of commending a book in defence of the papal supremacy, or allowing it to be good, after having read it, or even after having heard a report of its being written in a foreign country, is an extolling or setting forth, &c. of the papal authority within the meaning of the statute(s). It has even been holden, (although two of the Judges dissented from that construction,) that a Judge may ask a prisoner after conviction of, and condemnation for, a first offence, whether he be still of the same opinion, and that if he answer in the affirmative, he is guilty of high treason, as having advisedly maintained the Pope's power a second time (*t*).

(*s*) Hawkins's Pleas of the Crown,
book I. c. 17, s. 93.

(*t*) *Ibid.* book I. c. 17, s. 94.

The next of the statutes of spiritual treasons is the 13 Eliz. c. 2. The using or putting in ure, within the realm, or the then actual dominions of the same, any bull, writing, or instrument of absolution or reconciliation of persons to the see of Rome, and the getting, publishing, or putting in ure any bull, writing, or instrument whatever coming from Rome, and the assuming, or even promising, under colour of any bull, writing, or instrument for the purpose, to absolve or reconcile, any person or persons within the realm or its then actual dominions, by speech, writing, or other open deed; and the receiving such absolution or reconciliation; are severally, by ss. 2 and 3, declared to be high treason, and punishable as such. All aiders, comforters, or maintainers of offenders, after the fact, are, by s. 3, made liable to the pains of premunire. And by s. 4, all persons to whom such bulls, &c., or such absolution, &c., shall have been offered, and shall not signify the same to the Council within six weeks afterwards, shall incur the penalties of misprision of high treason. And any justice of peace, not disclosing to a Privy Councillor for fourteen days any of these matters that may have been declared to him, shall incur the penalties of premunire. (s. 10.)

The next Act, 23 Eliz. c. 1, refers to the same subject as the last, but is far more ample in its comprehension. The penalties of high treason are enacted (s. 2) against all persons, “which have or shall have, *or shall pretend to have, power, or shall, by any ways or means put in practice*, to absolve, persuade or withdraw” any, within the realm or its then actual dominions, “from their (u)

(u) According to the theories of those days, ecclesiastical or spiritual would be considered natural obedience. The preamble of the Act 1 Eliz. c. 1, describes the laws which vested the supremacy in Henry VIII. as “good laws and statutes made

and established for the *restoring* and uniting to the imperial crown of this realm, the *antient* jurisdictions, &c. to the same *of right* belonging.” Notwithstanding the Relief Acts, that theory still subsists, and is law at the present day.

GUIDE
TO
THE LAWS OF ENGLAND
AFFECTING
ROMAN CATHOLICS.

CHAPTER I.

ROMAN CATHOLICS.

IN the modern language of the law, those who acknowledge the religious supremacy of the see of Rome, and are in communion with it, are called Roman Catholics. By the 31 Geo. III. c. 32, those persons professing the popish religion, or holding communion with the see of Rome, who desired to take the benefit of that act, were required to swear in terms that they professed the Roman Catholic religion. No such clause is contained in the oath now appointed to be taken by them : yet the same appellation of Roman Catholic continues to distinguish persons of that church in all the acts that have followed the 31 Geo. III. c. 32 (*a*).

In all the penal acts they were styled Papists, Papishes, or persons professing the popish religion. This name has been generally considered one of reproach, and a learned writer has remarked that the more modern is also the more liberal distinction (*b*). It was not introduced, however, at the period of the first Relief Act (*c*).

(*a*) See the 10 Geo. IV. c. 7 ; 2 & 3 Will. IV. c. 115 ; and the subsequent acts cited in the course of this work.

(*b*) Toml. Jacob's Law Dict. tit. *Papists*.

(*c*) 18 Geo. III. c. 60.

Roman Catholics continued to be described as papists and popish persons until the passing of the 31 Geo. III. c. 32, which was the next in order.

Neither the ancient nor the modern names are older, of course, than the Protestant Reformation in the sixteenth century. Previous to that event there existed no reason for their receiving any specific appellation whatever. In old acts of parliament, the king's lieges are sometimes spoken of as *matris ecclesiæ fideles*. But communion with Rome being at that time warranted at law, those in such communion were known to the law only as members of the Established Church, and by no means because of their foreign communion.

In reviewing the present state of the law as it affects Roman Catholics, it will be necessary to observe two great divisions of inquiry. The Relief Acts did not absolutely repeal all the oppressive enactments from which they were intended to relieve Roman Catholics. By far the greater part of these continued in force, notwithstanding the Relief Acts. The legislature never meant to emancipate the consciences of any Roman Catholics, but such as were willing to give securities not to weaken the established institutions in church and state. Scarcely a single concession can be named, in fact, to which conditions are not inseparably attached by the enactment itself. If any Roman Catholic should be desirous of the relief afforded by the measure, he must prepare himself to accept the terms on which it is afforded. If he declines the terms, he deprives himself of the relief; and, with a very trifling exception, all the penal code continues to be in force against him. It may even be reasonably doubted whether such a person is entitled to the more liberal designation of Roman Catholic. Not within the Relief Acts for one purpose, it seems difficult to understand that he can place himself within them for another.

What the terms or conditions alluded to are, will be

presently considered. In the meantime it may be observed that their effect has been to divide the Roman Catholics of England into two distinct sections. The disabilities affecting these will be more conveniently handled under a corresponding division of this treatise. We shall first inquire into such as are general,—affecting all Roman Catholics alike, whether qualified under the Relief Acts or not. In the next place we shall limit our inquiry into such as exclusively concern certain Roman Catholics, by reason of their not being qualified under those enactments. We shall hereafter consider both of these in their above order. But, for the present, it may be not altogether out of place to premise here a short view of the principal conditions which are attached to the relief afforded by the enactments in question.

CHAPTER II.

THE ROMAN CATHOLIC OATH.

UNDER the 10 Geo. IV. c. 7, intituled "An Act for the Relief of His Majesty's Roman Catholic Subjects," (sections 2 to 23,) the following oath is to be taken by the Roman Catholics of this realm in lieu of all other oaths and declarations prescribed by former Relief Acts, except the oath formerly taken by them to enable themselves to hold property, that oath being abolished by section 23. Nevertheless, the oaths of allegiance and disavowal of the Stuart line must still be taken under the 6 Geo. III. c. 53, s. 1, and the 1 Geo. I. st. 2, c. 13, ss. 10, 11, whenever required so to do, under the pains of popish recusancy convict in case of refusal, (see *post*, p. 19). For neither of those acts was a relief act, nor consequently are they within the meaning of the above enactments (*d*).

"I, *A. B.*, do sincerely promise and swear, That I will be faithful and bear true allegiance to her majesty Queen Victoria, and will defend her to the utmost of my power against all conspiracies and attempts whatever, which shall be made against her person, crown, or dignity. And I will do

(*d*) Sixth Report of Commissioners on Criminal Law, p. 97. It should be mentioned, too, that the language of the 23rd section of the 10 Geo. IV. leaves it very doubtful what is the true construction of it. "No oath or oaths shall be tendered to, or required to be taken by, &c. for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to and required to be taken by her majesty's other subjects." The literal

sense of this clause would import that Roman Catholics are deprived of the benefit of the former Relief Acts, and must take such oaths as may still be required of Protestants, unless they have protected themselves by qualifying under the 10 Geo. IV. c. 7; but probably, by a liberal interpretation of a remedial enactment, the courts would understand such oaths to have been intended as are necessary to the holding of property by other subjects; *viz.*, none at all.

my utmost endeavour to disclose and make known to her majesty, her heirs and successors, all treasons and traitorous conspiracies which may be formed against her or them. And I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown; which succession, by an act intituled, *An Act for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject*, is and stands limited to the Princess *Sophia*, Electress of Hanover, and the heirs of her body, being Protestants; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of this realm. And I do further declare, That it is not an article of my faith, and that I do renounce, reject, and abjure the opinion, that princes excommunicated or deprived by the pope, or any other authority of the see of *Rome*, may be deposed or murdered by their subjects, or by any person whatsoever. And I do declare, That I do not believe that the Pope of *Rome*, or any other foreign prince, prelate, person, state, or potentate, hath or ought to have any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm. I do swear, That I will defend to the utmost of my power the settlement of property within this realm, as established by the laws. And I do hereby disclaim, disavow, and solemnly abjure any intention to subvert the present church establishment, as settled by law within this realm. And I do solemnly swear, That I never will exercise any privilege to which I am or may become entitled, to disturb or weaken the protestant religion or protestant government in the United Kingdom. And I do solemnly, in the presence of God, profess, testify, and declare, That I do make this declaration and every part thereof, in the plain and ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatsoever. So help me God."

Time and Place of taking the Oath, in general.

All persons professing the Catholic religion, and desirous of being relieved from the disabilities, incapacities, and penalties, specified in the various Relief Acts (except the disability of holding or enjoying real or personal property), may personally appear in any of the courts of Chancery, Queen's Bench, Common Pleas, or Exchequer, at Westminster, or in any court of General Quarter Sessions for the county, city, or place, where such persons shall reside, and there, in open court, between the hours of nine in the morning and two in the afternoon, take and subscribe the above oath. (10 Geo. IV. c. 7, s. 23; 31 Geo. III. c. 32, s. 1.)

By Peers, &c.

Peers and members of the Lower House must take and subscribe the oath at the time they take their seats or vote, under the same penalties as are awarded in the case of protestant members of the two houses so offending. (10 Geo. IV. c. 7, s. 4.)

By Candidates and Electors, &c.

Roman Catholics may be elected, and vote at elections of members of parliament, if otherwise qualified, upon taking the above oath. (s. 5.)

By Corporate Officers, &c.

Roman Catholics elected or appointed to corporate offices in England, must take and subscribe upon admission, or within one month previously to it, in the presence of the proper local officers, and in default of such, of two councillors or justices of the borough, or two county justices. (s. 19.) But *quære* as to the application of this clause to municipal corporate offices created since the act?

By Officers of the Crown.

It would seem that the provisions of the 9 Geo. II. c. 26, s. 3, as to time and place, are, with the exception of offices in the navy and army, repealed as to Roman Catholics, by the 20th section of the 10 Geo. IV. c. 7, although the language of the later act is somewhat general and vague. Every Roman Catholic appointed to "any office or place of trust or profit" under her majesty, must have taken and subscribed the oath within three calendar months before the appointment to, or before he presumes to exercise, enjoy, or act in such office or place; and either in one of the courts at Westminster, or in the Assize Court, or Court of General or Quarter Sessions, for his county or place of residence, between the hours of nine in the morning and four in the

afternoon. The penalty for exercising or enjoying such office or place, or "any other office or franchise," without the above formalities having been observed, is a fine of 200*l.* to the crown for each offence, and the forfeiture of such office, place, or franchise. (s. 21.) In addition to these, the fine of 500*l.*, and the disabilities imposed by the 25 Car. II. c. 2, s. 5, and which are referred to at a later period of the treatise, may, in cases within that act, be still exacted (*e*). But from the operation of the last-mentioned act, naval and military officers, whose commissions were made out in Ireland, are exempted by the 53 Geo. III. c. 128.

By Ecclesiastics and Teachers.

Roman Catholic ecclesiastics, of whatever rank or order in the church, must take and subscribe the oath before officiating or exercising their functions as such. (31 Geo. III. c. 32, s. 11.) If the 3rd section of the 2 & 3 Will. IV. c. 115, extends to schoolmasters, masters, and other persons employed in all Roman Catholic schools or places for worship, education, and charitable purposes, it seems probable that such persons may take the oath at any time, as in the general case of persons desirous of taking the benefit of the 10 Geo. IV. c. 7, and the 31 Geo. III. c. 32. But it is doubtful whether the 2 & 3 Will. IV. c. 115, s. 3, be not in effect confined to schools and other places endowed under the provisions of that act. Even in the latter case it may be dangerous to rely upon the loose wording of the section. It merely provides that the oath appointed by the 10 Geo. IV. c. 7, shall be taken at the times and in manner in that act mentioned. By far the more prudent course would be for all Roman Catholic tutors and schoolmasters to take and subscribe that oath before they enter upon their calling. (31 Geo. III. c. 32, s. 14.) At any rate they are bound to do so

(*e*) *Post*, p. 49.

within the time mentioned in the 9 Geo. II. c. 26, s. 3, to which we shall presently advert. And it is certain that it will be too late to supply the omission after a party has been apprehended, or after a prosecution has been commenced against him. (18 Geo. III. c. 60, s. 5.)

By Naval and Military Officers.

Commissions in the navy and army may be made out without the oath having been required at the time. (57 Geo. III. c. 92.) But, if not taken and subscribed then, the omission must be supplied at the time and in the manner specified by the 9 Geo. II. c. 26, s. 3, which will be noticed under the next heading. This is in effect provided by the 22nd section of the 10 Geo. IV. c. 7.

Miscellaneous Cases.

Roman Catholic naval and military officers, schoolmasters and ushers, high and chief constables, serjeants-at-law, counsellors-at-law, barristers, attornies, solicitors, clerks, and notaries, must take and subscribe the oath within six months after admission or appointment as such, in one of the courts at Westminster, or at the General or Quarter Sessions for their respective counties or places of abode. If they are beyond seas at the time, they must take and subscribe it in like manner within six calendar months after their return. (9 Geo. II. c. 26, ss. 3, 4.) In many cases an omission to comply with the law in this respect continues to be punishable under the 25 Car. II. c. 2, s. 5 (*f*).

It should be remarked that, unless otherwise provided, the Roman Catholic oath, as to the time and manner of its being taken and subscribed, must follow the formalities in these respects specified by the enactments under which the oaths it has replaced were appointed. (10 Geo. IV. c. 7, s. 23.)

Registers of Qualified Catholics.

In every court, the proper officer appointed for the administration of the oath to Roman Catholics is charged with the obligation of transmitting to the clerk of the privy council, on or before Christmas-day in each year, "lists of the persons, with their titles, additions, and place of abode," who shall have taken and subscribed such oath. (31 Geo. III. c. 32, s. 2.)

From the passing of the first Toleration Act, 18 Geo. III. c. 60, down to the present time, there have existed two classes of Roman Catholics: 1st, those who are willing to take the oath; 2nd, those who refuse it. It may be remarked, that these last are said to be neither few nor without influence. It is added, that their unwillingness is occasioned by their rigid way of construing those clauses only of the oath, that disavow an intention of subverting the church establishment, and engage the person taking the oath, not to use any privilege to the detriment of the protestant faith. But this is quite immaterial. They may not have the least objection to the declaration of allegiance or the other clauses contained in the oath; but whatever may be their motive, they are nonjurors, and are in that capacity subject, not only to all the general disabilities that press upon their fellow Catholics who consent to take the oath; but to other and heavier ones from which the latter have been exempted by the Relief Acts.

CHAPTER III.

GENERAL DISABILITIES OF ROMAN CATHOLICS IN
ENGLAND.*The Crown.*

By the 12 & 13 Will. III. c. 2, s. 2, which limited the crown of England to the Princess Sophia of Hanover, and the heirs of her body, being Protestants, it was enacted, that "all and every person or persons, who should or might take or inherit the said crown, by virtue of the limitation of that act, and was, were, or should be reconciled to, or should hold communion with the see or Church of Rome, or should profess the popish religion, or should marry a papist," should be excluded from, and made incapable to inherit, possess, or enjoy the crown and government of this realm. (See also the Relief Act, 31 Geo. III. c. 32, s. 12.)

And by the act for the naturalization of the Princess Sophia, and the issue of her body, it was provided that "every person and persons" thereby naturalized, "who should become a papist, or profess the popish religion," should be "adjudged and taken as an alien." (4 Ann. c. 4, s. 2.)

The Regency.

By the 10 Geo. IV. c. 7, s. 12, no person or persons professing the Roman Catholic religion, shall hold or exercise the office of guardians and justices, or regent of the United Kingdom, under whatever name, style, or title such office may be constituted. Under the late act to provide for the administration of the government in case of a demise of the crown to her present majesty while

under the age of eighteen years (*g*), the Duchess of Kent, or the Queen Dowager, as the case might be, were required, before acting or entering upon the office of regent of the United Kingdom by virtue of that act, or within one calendar month after, to make and subscribe the declaration against popery mentioned in the 30 Car. II. st. 2, c. 1, and produce a certificate of having received the Lord's Supper in one of the royal chapels, at the time of taking, in the privy council, the usual oaths of office, (s. 8). On marrying a Roman Catholic, the regent was to forfeit her office, (s. 10). It is remarkable that there was no provision for the case of her becoming a Roman Catholic. But by the existing act for providing for a similar demise of the crown to her present majesty's issue while under the age of eighteen years, it is enacted (*h*), that before his royal highness Prince Albert shall act or enter upon the office thereby vested in him of regent of the United Kingdom, he shall, before the privy council, take the oaths of allegiance, supremacy, and abjuration, in addition to the oaths of office, (s. 3). The above-mentioned oaths are substituted for the declaration against popery and the certificate of having received the sacrament. But by a clause (which is to be found in both Regency Acts) the regent is disabled from giving the royal assent to any bill for altering the course of succession to the crown, the doctrines or discipline of the Established Church, or the presbyterian government in Scotland, (s. 5). And lastly, his royal highness will forfeit the regency and the guardianship of the infant sovereign by becoming personally reconciled to the see of Rome, or by professing "the popish religion" himself, as well as by marrying with "a person professing the Roman Catholic religion." (s. 6.)

The Viceroyalty of Ireland.

By the 12th section of the 10 Geo. IV. c. 7, no Roman

(*g*) 1 Will. IV. c. 2.

(*h*) 3 & 4 Vict. c. 52.

Catholics can hold or enjoy the office of Lord Lieutenant, Lord Deputy, or other chief governor or governors of Ireland.

The Great Seal.

The same section disables all such persons from holding or enjoying the offices of Lord High Chancellor, Lord Keeper or Lord Commissioner of the Great Seal of Great Britain or Ireland.

The High Commissionership.

And the office of her majesty's High Commissioner to the General Assembly of the Church of Scotland is similarly excepted by the same section.

The Established Church.

Although exclusion from the Establishment can scarcely be now considered a case of grievance to Roman Catholics, there is no doubt whatever that it is a disability, and was so intended by the legislature. The 16th section of the present act provides in general terms that it shall not be construed "to enable any persons, *otherwise than as they are now by law enabled*, to hold, enjoy, or exercise any office, place, or dignity of, in, or belonging to the United Church of England and Ireland, or the Church of Scotland," or "to any cathedral or collegiate, or ecclesiastical establishment or foundation."

The Ecclesiastical Courts.

The same general provision is extended by that section to all ecclesiastical courts of judicature of England and Ireland, courts of appeal from or review of the same, and to the Commissary Court of Edinburgh.

Universities and Colleges, &c.

In the like general manner this section excepts offices

or places, in "any of the universities (*i*) of the realm," or in "any of the colleges or halls of the said universities, or the colleges of Eton, Westminster, or Winchester, or any college or school within this realm," and it then goes on to reserve particularly all local statutes, ordinances, or rules, established or to be established "by competent authority" within such institutions, "by which Roman Catholics shall be prevented from being admitted thereto, or from residing or taking degrees therein."

The 31 Geo. III. c. 32, s. 14, is less comprehensive, but far more explicit. It disables Roman Catholics from *obtaining or holding* the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, or from keeping a school in the universities of Oxford or Cambridge. However, as to "schools or other places" within the 2nd section of the 2 & 3 Will. IV. c. 115, any "schoolmaster or other master is thereby empowered to qualify himself for employment, by taking the oath appointed by the 10 Geo. IV. c. 7, in manner therein mentioned." But it is doubtful whether such schools must not be Roman Catholic schools endowed under the 1st section of the act. It is scarcely possible to say how far the courts will be inclined to extend the meaning of this loosely worded section.

Advowsons, Presentations, &c.

Although there can be no practical grievance to a Roman Catholic in being forbidden by law to do that which his conscience would scarcely permit him in any case to do, nevertheless, regard being had to the object for which restraints were imposed by the legislature upon Roman Catholic owners of Church of England patronage, these naturally range themselves among the general dis-

(*i*) That is, all universities, &c. when the act came into operation.
existing on the 23rd of April, 1829, (See section 40.)

abilities to which those religionists are still subject. The 11 Geo. II. c. 17, s. 5, declares null and void all grants whatever made, after the 6th of May, 1738, by any papist, or by any mortgagee or trustee on his behalf, secret or avowed, of "any advowson or right of presentation, collation, nomination, or donation, of and to any *benefice, prebend, or ecclesiastical living, school, hospital, or donative,*" and of any avoidance thereof. It excepts, however, all *bonâ fide* grants for "a full and valuable consideration" to protestant purchasers, and only for the benefit of such purchasers. It makes void in like manner all devises of such hereditaments by Roman Catholics, if made "with intent to secure the benefit thereof to the heirs or family" of the devisor;—otherwise it seems such devises will not be illegal. It is remarkable that while this act avoids all sales of such hereditaments as between Roman Catholics, even for a valuable consideration, and all gifts of the same by Roman Catholics even to protestant grantees, there is nothing to disable Roman Catholics from taking, under protestant grantors, whether by deed of gift, or as purchasers for valuable consideration.

So long as such right of presentation, collation, or nomination remains vested in a Roman Catholic, he cannot exercise it. At every vacancy it devolves for that turn only on the chancellor and scholars of the University of Oxford, or on the chancellor and scholars of the University of Cambridge, according to the local site of the benefice, prebend, living, school, hospital, or donative, in respect of which the vacancy has occurred. The exercise of such right by the Roman Catholic, and every admission, institution, and induction, made in pursuance of it, are declared to be utterly void and of no effect. (12 Ann. stat. 2, c. 14, s. 2.) And it is provided, but only in the case of benefices and ecclesiastical livings, that if the ordinary "shall have cause to suspect" the party presenting, of being "a papist or trustee of any person making profession of the popish religion, or suspected to

be such," he shall tender to him the declaration against transubstantiation ; and in case he shall neglect or refuse to make and subscribe it, that then the presentation shall be utterly void and of none effect ; and so it shall be certified by such ordinary within ten days afterwards to the vice-chancellor of the university, to which such presentation would have devolved, had the party presenting been a popish recusant convict, and the chancellor and scholars of the university shall thereupon exercise the right of presentation for that turn only, (s. 3). If the party conform before an avoidance, nothing vests in the university (*k*). But if the avoidance have taken place, and so the right for that turn have become vested in the university, it shall not be divested again by the patron's conforming himself to the church (*l*). And a trustee, mortgagee, or grantee of an avoidance, *whereof the trust shall be for any popish recusant convict*, shall forfeit the sum of 500*l*. if he present without giving notice to the university within three months after the avoidance. (1 Will. & Ma. c. 26, s. 4).

The ordinary is empowered to examine the presentee upon oath as to the real interest of the nominal patron, and as to whether such patron be a papist or not, with the like consequences if he refuse to answer, or answer evasively. (12 Ann. c. 14, s. 3.) The universities are also empowered to bring their bill for the discovery of the secret trusts of the advowsons of any benefice or ecclesiastical livings, as well against the patron as against any such person as they have reason to believe to be the *cestui que trust*, and generally against any person who they have cause to suspect may be able to make any other or further discovery of such secret trusts and practices. If the defendants or any of them refuse or neglect to answer the bill, it shall be taken *pro confesso*, and be received as evidence against the defendant so failing to

(*k*) *Cottington v. Fletcher*, 2 Atk. 155.

(*l*) *The University of Oxford's* case, 10 Co. 58 (*a*).

answer, and his trustees and presentee. Every defendant answering fully and knowing nothing of such secret trust shall have his costs, (s. 4). But it was resolved by Lord Chancellor Talbot, in the case of a Mr. Brett, whom the University of Oxford presented to a living that belonged to the Fitzherberts of Swinnerton, that the bills intended by this statute were bills of discovery, and that no bill founded upon it can be for relief (*m*). Power is given by s. 5 to the court where any *quare impedit* shall be pending, to make, upon motion, any rule or order for the examination upon oath of the patron and his presentee, "in order to the discovery of any secret trust, frauds, or practices, relating to the presentation then in question." A refusal to make such discovery shall be punished as a contempt. If it shall be discovered upon this examination that there is a secret *cestui que trust* of the advowson, the court, upon motion, shall make a rule or order that such *cestui que trust* shall make and subscribe the declaration against transubstantiation, and likewise, upon pain of incurring a contempt, give such further satisfaction upon oath touching the trust, as the court shall think fit. If he refuse the declaration, the presentation shall be null and void, and the right shall devolve upon the university for that turn. The court, for the purpose of such discovery, may enforce production of all deeds relating to such trusts, (s. 10). All answers, examinations, and affidavits, taken in equity, at law, or before the ordinary, shall be evidence against the patron and his presentee, (s. 6). But no bill of discovery shall subject any person, making discovery or not answering such bill, to any penalty or forfeiture, other than the loss of the presentation then in question, (s. 7). It is remarkable that all of these provisions for the effectual discovery of the interest and religious tenets of patrons are confined to

(*m*) Bacon's Abridgment, *Papists* (C), s. 6.

natural obedience," or to withdraw them "for that intent," from the established religion to the Romish religion, "or to move them, or any of them, to promise any obedience to any pretended authority of the see of Rome, or of any other prince, state or potentate, *to be had or used within the queen's dominions*," or shall do any overt act to that end;—and also against any person, who shall "*by any means*" be willingly withdrawn or absolved, or reconciled, or promise obedience as aforesaid, and his procurers and counsellors thereunto. Aiders and maintainers, and persons not disclosing the offence to a justice of the peace or higher officer for twenty days after knowledge thereof, are, by s. 3, declared guilty of misprision of treason.

The penalties of high treason are re-enacted with greater rigour by a later act, 3 Jac. I. c. 4, ss. 22, 23, against persons in like manner absolving, persuading, or withdrawing others, or being themselves so absolved, persuaded, or withdrawn, "either upon the seas, or beyond the seas, or in any other place within the dominions of the king's majesty, his heirs or successors," and against all their "procurers and counsellors, aiders and maintainers."

Jesuits and Foreign Priests.

Jesuits and Regulars, foreign priests resident in England, (excepting chaplains to embassies,) and Englishmen educated in foreign seminaries, are, unless duly qualified under the Relief Act, still liable to the provisions of the 27 Eliz. c. 2. By s. 3 of that statute, no Jesuit, seminary priest, or other such priest, deacon, or religious or ecclesiastical person whatsoever, born within the realm, or any other of its then actual dominions, and ordained or professed by authority derived from the see of Rome, shall come into, be, or remain in this realm, or other the then actual dominions aforesaid, under pain of high treason, unless licensed, under

s. 12, by the bishop of the diocese and two county justices, and that only in case of bodily infirmity, to remain in their actual abode, for a period not exceeding six months. And the same penalty is enacted, by s. 5, against all laymen educated in any Jesuit college, or seminary beyond the seas, who shall not return to this realm, and there take the oath of supremacy within six months after royal proclamation made in that behalf in the City of London.

The author ventures to suggest that there is no foundation for the doubt intimated by the learned Commissioners on Criminal Law (*u*) as to these statutes being now in force. The provisions of the 10 Geo. IV. c. 7, ss. 29 *et seq.*, were framed for the "gradual suppression" of those Jesuits and Regulars who might have qualified themselves under the 31 Geo. III. c. 32, and who would have thereby acquired a legal existence. But if, in addition to these, there were, within the realm, Jesuits and Regulars who declined to qualify, then, by the express terms of the 31 Geo. III., they were already liable to the severest penalties of the general law. Therefore the effect of the 10 Geo. IV. has simply been to restrict the relief granted to Jesuits and Regulars, under the 31 Geo. III., not to grant them a relief not contemplated by that enactment.

II.—RECUSANCY.

Professors of the Roman Catholic religion, who, without lawful or reasonable excuse, forbear or refuse to come on Sundays and holidays to the church or chapel of their respective parishes, or, in case of reasonable difficulty, to some usual place for the celebration of common prayer and divine service after the ritual of the Established Church, there to abide during the time of

(*u*) Sixth Report, p. 40 (*b*).

worship, are called Popish Recusants. After conviction they are called Popish Recusants Convict. The Statutes of Recusancy, properly so called, are, 1 Eliz. c. 2, 23 Eliz. c. 1, 29 Eliz. c. 6, 35 Eliz. c. 2, 3 Jac. I. c. 5, 7 Jac. I. c. 6, and 3 Car. I. c. 2. But, besides these, there is a multitude of clauses to be found among the penal laws passed for restraint of popery, which declare that other offences of an entirely new order shall be deemed acts of popish recusancy, and that those convicted of them shall be deemed popish recusants convict. This style of expression is used as a convenient mode of stating the penalties to which it is intended to subject those offenders. Just so, it has frequently been enacted that certain other offenders shall incur the pains and forfeitures of premunire.—The expression in neither case is intended to signify that those specific offences belong to the class noticed by the Statutes of Recusancy, or those of Premunire; but simply that they shall be punishable in like manner.

The pains of recusancy are various. They may be classed as Forfeitures and Disabilities.

1. FORFEITURES.

For a first offence the forfeiture is 12*d.*, leviable by distress. The churchwardens may levy it, under the 1 Eliz. c. 2, s. 14, or it may be levied under one justice's warrant, and the justice may commit to prison in default of distress. (3 Jac. I. c. 4, s. 27.)

But there is an additional forfeiture of 20*l.* for every month during which it shall appear by the conviction that the recusant has forborne the established worship, and also for every succeeding month, (no further conviction nor indictment being afterwards necessary, when once a man becomes a popish recusant convict). These sums must be paid into the Exchequer in the two non-issuable terms; and to that end, the convictions are required to be certified into the Exchequer before the

end of the term next following the conviction. A third of the penalty is to be assigned to the poor. In default of payment of these sums, or any of them, the queen may by Exchequer process seize all the recusant's goods, and two thirds of all his "lands tenements and hereditaments, leases and farms." Her majesty may elect to take, in lieu of the 20*l.* a month, two thirds of the "lands tenements and hereditaments, leases and farms," in which the recusant is in any way beneficially interested, and to retain them to her own uses, until conformity. Nothing is here said of the application of this privilege of election to the goods of the recusant. But, probably by way of indemnity for the waiver of the goods, it is, as we have just seen, provided, that her majesty shall retain the two thirds of the lands, &c. "to her own uses," no mention being made of the poor. The queen, however, is not allowed to take the recusant's mansion house in her two thirds of the estates. Nor can she demise to him any portion of the two thirds in her hands. (29 Eliz. c. 6, s. 4; 3 Jac. I. c. 4, ss. 8, 9, 11) (*x*). If any popish recusant convict shall conform, and shall not afterwards, within one year after his conformity, receive the sacrament in his own parish church, or if there be none such, in the next adjoining church, the forfeiture for the first year is 20*l.*; for the second year 40*l.*; and for every succeeding year 60*l.*, until he or she shall have received the sacrament. The penalty of 60*l.* will also be incurred by such recusant convict's again omitting, for one whole year after so receiving the sacrament, to receive it again in like manner. These sums may be recovered at Nisi Prius or sessions, by action of debt, bill, plaint, or information; half to go to the informer and half to the crown. (3 Jac. I. c. 4, ss. 1, 2, 3.) And no such action shall abate by reason of any demise of the crown (*y*).

(*x*) Compare 1 Hawk. Pleas of the Crown, book I. c. 10, s. 43, and 6th Report of Commissioners on Criminal Law, p. 93 (*u*).

(*y*) *Lionell Farrington's case*, Cro. Car. 10.

Marriage.

Every popish recusant convicted married to a woman not being an heiress, otherwise than in open church or chapel, according to the orders of the Church of England, and by a minister lawfully authorized, shall forfeit 100*l.*, to be recovered and apportioned in like manner. If she be an heiress, he shall be disabled to have any interest in her lands or hereditaments, as tenant by the curtesy of England. Every female recusant convicted, so married otherwise than as aforesaid, shall have neither dower nor freebench in any of the freeholds or copyholds of her husband. (3 Jac. I. c. 5, s. 13.)

Baptism.

The omission of baptism at the hands of "a lawful minister, according to the laws of this realm," for one month after the birth of the child, subjects the father, being a popish recusant, to the penalty of 100*l.* for every such offence. If he be dead within the month, then the mother is liable. The penalty is made recoverable in like manner, but the informer is to have only a third; the remaining two thirds are to go to the queen and the poor. (3 Jac. I. c. 5, s. 14.)

Burial.

The penalty of 20*l.* is, by s. 15, imposed upon the personal representatives of a popish recusant, "*not being excommunicate*," or the person concerned in the burial of such person, if the corpse be buried elsewhere than in the church or churchyard, "or not according to the ecclesiastical laws of this realm." It is recoverable and to be apportioned in precisely the same way as the penalty for omitting lawful baptism.

Upon these enactments touching marriages, baptisms, and burials, it is to be remarked, that to bring an informal marriage within the provisions of the 13th section,

it will be necessary to prove, not only recusancy, but also a conviction of that offence. But, under ss. 14 and 15, it will be enough if recusancy alone be established. It must also be borne in mind that the Marriage Acts, 6 & 7 Will. IV. c. 85, and 7 Will. IV. & 1 Vict. c. 22, and the Acts for Registering Births, Deaths, and Marriages, 6 & 7 Will. IV. c. 86, and 7 Will. IV. & 1 Vict. c. 22, apply generally to all the subjects of her majesty in England. It is certain that if the marriage of the popish recusant convict have been solemnized according to the forms prescribed by these acts, he will be shielded from the penalty mentioned in the 3 Jac. I. c. 5. But that act not having been repealed, an essential departure from the prescriptions of the Marriage Acts will not only entail the consequences specified in those acts, but will deprive the recusant convict of their protection, and leave him once more exposed to his former liability. So, too, if the interment of the popish recusant, or the birth of the child, have been registered in the manner prescribed by the Registration Acts, the penalty cannot be levied, but not otherwise. It is true that the statute of James speaks of omission of lawful baptism, and performance of unlawful burial, while the Registration Acts refer to births and deaths only. But the intent of the enactments was the same, and the expressions used in the penal enactment will be liberally interpreted, *in favorem libertatis*, so as to be incorporated into the modern and remedial one. The preamble of the 13th, 14th, and 15th sections of the statute of James, shows that the mischief they were designed to remove, was the uncertainty of title which the clandestine performance of these rites was likely to occasion. The language of the preamble is as follows:—
 “ And for that popish recusants are not usually married, nor their children christened, nor themselves buried, according to the law of the Church of England, *but the same are done superstitiously by popish persons in secret,*

whereby the days of their marriages, births, and burials, cannot be certainly known." Therefore the Registration Acts, which were passed "to provide the means for a complete register of the births, deaths, and marriages of her majesty's subjects in England," are *in pari materiâ* with these three sections of the statute of James, and must be read with them.

Married Women.

By section 10 of the 3 Jac. I. c. 5, every popish recusant convict, being the widow of one not convicted of recusancy, who shall not conform to the established worship, and receive the sacrament according to law, during one whole year after her husband's death, shall forfeit to the crown two thirds of her jointure and two thirds of her dower during her life, and all share in her husband's goods and chattels, and be disabled to be his executrix or administratrix.

If a married woman do not conform and receive the sacrament according to law within three months after conviction of popish recusancy, she shall be imprisoned without bail or mainprise, until conformity, under the warrant of a privy councillor or the diocesan, if she be a peeress; and if she be under that degree, of two justices of the peace, one of them being of the quorum. If her husband shall pay to the crown ten pounds for every month of her nonconformity, or, at his option, yield into the queen's hands a third of his lands and tenements, she may, so long as the money is paid, or the lands &c. are retained, but no longer, remain at liberty. (7 Jac. I. c. 6, s. 28.)

2. DISABILITIES OF POPISH RECUSANTS.

Excommunication.

The 3 Jac. I. c. 5, ss. 11 and 12, and 1 Will. & Mary, sess. 1, c. 8, s. 12, enact, that "every popish recusant

convict shall stand, *to all intents and purposes*, disabled as a person lawfully excommunicated, and as if such person had been so denounced and excommunicated according to the laws, until he or she shall conform him and her self, and come to church and hear divine service, and receive the sacrament of the Lord's Supper, according to the laws of this realm, and also take the oath of allegiance and abjuration of papal supremacy; and that every person sued by such person so disabled, shall and may plead the same in disabling of such plaintiff, as if he or she were excommunicated by sentence in the Ecclesiastical Court," unless such action or suit concern "such of his or her lands, &c., or the issues and profits thereof, as are not to be seized into the queen's hands by force of law, for his or her recusancy."

If, after such a plea of disability, it be certified to the court that the plaintiff has conformed, the defendant will be ordered to plead in chief. And if the plaintiff then relapse, and be convicted a second time of recusancy, the disability cannot be a second time pleaded by the defendant in that action or suit (*z*). Nor is the plea available in a *qui tam* action (*a*); nor against the next friend of an infant in a suit in equity (*b*); nor to an action by a corporation, in the name of their bailiffs (*c*).

Two works of great authority (*d*) declare it to be the better opinion, that this act, being a penal act, must be construed strictly, and that the words, "as persons lawfully excommunicate," mean nothing more than the disabling the convict to sue, but do not bring upon him any other consequences of excommunication.

But to this it may be answered, that although a penal statute, it professes to have also in view the maintenance of "God's true religion, the state and commonwealth."

(*z*) Hetl. 176.

(*a*) 12 Co. 61.

(*b*) Pr. Reg. Ch. 278.

(*c*) Co. Litt. 134.

(*d*) Hawk. Pleas of the Crown, c. 12, s. 6; and Bac. Abr. *Papists*, &c. (A), s. 1.

Such acts have at all times received as liberal a construction, as strong an interpretation for the attainment of that end, as possible; for *summa est lex quæ pro religione facit* (e). All statutes that concern the public good are to be construed liberally (f), even though they be penal as to some of the community (g), for every statute is penal to some persons; and, if the extending of a penal statute by an equitable construction be more advantageous than prejudicial to the greater part of the people, it may, by the rules of law, be so extended (h). And popery has been said to be a conspiracy against the state as well as religion (i).

It is true that the 15th section of the same act speaks of the burials of "popish recusants *not being excommunicate*." The 12th section, concerning the omission of lawful baptism, had mentioned "popish recusants" without more, while the 13th section again, which applied to marriages, had used the terms, "popish recusants convicted." The object of this diversity of language seems clear. It was intended to proportion the rigorous provisions of the law to the notoriety of the papist. Some penalties were to apply to all recusants, others to such only as were convicted of recusancy. Convicted recusants were restrained from marrying otherwise than in the Established Church, but all recusants were bound to baptize their children according to the rites of that church. The provision made as to burials was intended also to apply generally to all recusants. But there was a difficulty in the way of this enactment. Persons under the sentence of excommunication could not be buried in consecrated ground. A recusant, although not convicted, might, under the 30th section of the act, be excommunicated by an ecclesiastical court. Therefore the exception

(e) Hobart, 157.

(f) Bac. Abr. *Statutes* (I), s. 7.

(g) Plowd. 36, 59.

(h) Bac. Abr. *Statutes* (I), s. 9.

(i) *Thornby v. Fleetwood*, 10 Mod.

117.

was inserted in the 15th section, and the term *excommunicate* was selected, as comprehending more than the term *convict*.

That this statute of James was, from the first moment of its enactment, interpreted to have imposed upon popish recusants convict all the other disabilities of excommunication, as well as that of bringing and prosecuting actions or suits, is clear from an early case at common law (*k*). Certain recusants were brought to the bar to take the oath and find sureties. Lord Chief Justice Coke told those who were willing to comply, that he would not take popish recusants [*convict*] for their sureties. For, under the statute of James, “every recusant convict is to be excommunicated, and, therefore, in my circuit I do not admit them for witnesses between party and party, they being no competent witnesses. . . . We have God, the king, and the law of the land on our side; also we have here dealt very favourably with you, and not in any rigorous manner. For we may, by the law of the land, attach every one of you by a writ *de excommunicato capi-endo*, being by the statute of 3 Jac. c. 5, excommunicated, being convicted; and if afterwards you do not conform yourselves according to the laws of the land, then we will deal with you according to the rigour of the law, by writs of *excommunicato capi-endo*.”—“The whole court agreed with him herein.”

The disabilities of popish recusants convict, therefore, must be taken to comprehend all those which appertain to excommunication (*l*). Besides the disability to sue, they cannot be witnesses, sureties, administrators, nor attornies or procurators for others; cannot act as executors, although they are not deprived thereby of the executorship, and are not to be allowed Christian burial. And we have seen (p. 39), that in certain cases, a female

(*k*) *The Attorney General v. Griffith and others*, 2 Bulstr. 155.

(*l*) Bac. Abr. *Excommunication* (D), s. 1.

popish recusant convict is even disabled to have the character of executrix.

Offices and Charges.

The 8th section of the 3 Jac. I. c. 5, applies to "recusant convicts" in general. It disables them from practising the common or civil law, as counsellor, clerk, attorney, solicitor, advocate or proctor,—physic,—and the trade of apothecary,—from being judge, minister, clerk, steward, register, town clerk, or other officer or minister of any court,—from keeping any court,—from bearing office as captain, lieutenant, corporal, sergeant, ancient-bearer, or other office in camp, troop, band, or company of soldiers,—and from being captain, master, governor, or bearing office in any ship, castle, or fortress of the crown,—under a penalty of 100*l.* for every such offence; one half to go to the queen, and the other to the informer. These words, "any office," or "any other office," following immediately after the several military and naval offices specifically named, would not, it is submitted, have the effect of disqualifying recusants convict in general from holding offices in either service of a higher rank than the highest of those that are so named. It is a well known rule in the construction of statutes, that when a statute begins by instancing certain individual cases, and concludes by extending its operation to "other" cases, it is to be understood as meaning "*such* others;" viz., others of the same or an inferior degree. Thus it was held, that the words, "any other means," in an act for vesting certain property in the crown, could not be intended of an act of parliament, for "the makers of the act would have put that in the beginning, and not in the end, after other inferior conveyances, if they had intended to extend the act thereunto." And it was mentioned that bishops were held to be not included in the 13 Eliz. c. 10, which enumerates "colleges, deans and chapters, parsons, vicars," and concludes, "and others having

spiritual promotions" (*m*). But all doubt as to popish recusants convict is removed by the 9th section of the 3 Jac. I. c. 5. It specifies "popish recusants convict," and even the husbands of popish recusants convict, (unless such husbands and their children, above nine years of age, shall repair to church once a month at least, and he, they, and his servants, of meet age, receive the sacrament,) and it disables all such from exercising "*any* public office or charge in the commonwealth, either in person or by deputy. It has been remarked, that in the 8th section there is nothing to prevent recusants convict in general from exercising their offices by deputy (*n*). This is certainly true for the most part. But there is reason to contend that the disability to keep any court is an exception to the rule, and that it embraced the keeping a court by deputy as well as in person.

Going Five Miles from Home.

By the 35 Eliz. c. 2, ss. 2, 3, 4, 6, and 7, and the 3 Jac. I. c. 5, ss. 6 and 7, every popish recusant convict, above sixteen years of age, shall, within forty days after his conviction, repair to his usual abode, or, if he have none, to his native place or his parents' abode, (unless at the time of his conviction he be absent from the realm, restrained by imprisonment or the royal command, or by command of six or more of the privy council, or unable by sickness to travel; in either of which recited cases, he must return to his usual abode, &c. within twenty days after the removal of the difficulty in question). Within twenty days after their return, they must notify it, with their true names, and present themselves to the parish minister or curate, and the town constable, headborough, or tithing-man, who shall enter these matters in a book to be kept in every parish for the purpose, and shall

(*m*) *Archbishop of Canterbury's*
case, 2 Co. 46 (*b*).

(*n*) Hawk. P. C. c. 12, s. 9.

afterwards certify them in writing to the next General or Quarter Sessions, where they shall be entered by the clerk of the peace on the rolls. No such person, after so returning to such place of abode or native place, shall pass or remove above five miles from thence, (each mile being one of 1760 yards, and reckoned, not as the crow flies, but by the nearest and most usual way *(o)*), without a written license from the queen, or three privy councillors, or without a special written license granted under the hands and seals of four of the local justices, with the assent in writing of the bishop, lord lieutenant, or deputy lieutenant, (not being one of the four justices) *(p)*, under his hand and seal, the convict having first taken his corporal oath before some one of such four justices, as to the cause of his journey, and that he will make no needless delay. The 13th and 14th sections of the 35 Eliz. c. 2, except all persons going to any court of law, or to the privy council or commissioners under process, or going under proclamation to yield themselves to the sheriff. The penalties for not returning to such place of abode or native place, or removing thence more than five miles without license, are forfeiture of goods and chattels, lands, tenements, and hereditaments, (whether freehold or copyhold,) and all rents and annuities during the offender's life. If he shall not have an inheritance of any kind of the clear yearly value of 20 marks, nor goods and chattels above the value of 40*l.*, and shall not, within three months after apprehension for so offending as aforesaid, conform to the Established Church, he shall, upon his corporal oath, at the requisition of any two justices of the peace, or coroner of the county, "abjure this realm of England and all other the queen's majesty's dominions for ever," and shall at once depart out of the realm at the port and within the time assigned by the justices or coroner,

(o) Cro. El. 212.

(p) *Mansfield's case*, Moor. 836.

unless he shall be prevented by such causes as were considered reasonable causes at common law in abjurations for felony; in which case he shall depart out of the realm as soon as such difficulty shall have ceased. The punishment of the convict for refusing to abjure, or for not departing out of the realm after abjuration, or for coming again into it, is death. The 7 & 8 Geo. IV. c. 8, s. 7, enacted, that no person convicted of felony shall suffer death, "unless it be for some felony which was excluded from the benefit of clergy *before or on the first day of the present* session of parliament. This was the case here. The 35 Eliz. c. 2, s. 10, adjudged this offence a felony, and the offender "to suffer and lose as in case of felony, without benefit of clergy" (*q*).

Coming to Court.

The 3 Jac. I. c. 5, s. 2, enacts, that no popish recusant convict shall come into the court or house where the queen or her heir apparent shall be, unless he be commanded so to do by the king, upon pain of 100*l*. And the 30 Car. II. st. 2, c. 1, ss. 5 and 6, enact, that every person convicted of popish recusancy, who shall come advisedly into or remain in the presence of the king or queen, or shall come into the court or house where they or any of them reside, shall be disabled to hold or execute any office or place of profit or trust, civil or military, in the realm, or its islands or plantations; to sit or vote in either house of parliament, or make a proxy in the peers; to sue or use any action, bill, plaint, or information at law, or suit in equity,—or to be guardian, executor, or administrator, legatee or donee,—and shall forfeit for every such offence 500*l*., the whole of which, as it seems, will go to the informer. The only alternative is to take the appointed oath in Chancery, within the term next after such his coming or remaining.

(*q*) Sixth Rep. Cr. L. Comm. p. 101 (*a*).

Coming near London.

By the 3 Jac. I. c. 5, ss. 4 and 5, it is enacted, that no popish recusant, indicted or convicted of recusancy, shall remain within ten miles of London, after ten days from the indictment or conviction, under pain of 100*l.*, one moiety to be paid to the queen, the other to the informer; except only such persons as shall have their only dwelling within the said city, or ten miles' compass of the same, not having any dwelling or abode elsewhere.

Keeping Arms.

The 27th, 28th, and 29th sections of the same act direct that all such armour, gunpowder and munition of whatever kind, as any popish recusant convict shall have in his own house, or elsewhere, or in the possession of any other, at his disposition, shall be taken from him by warrant of four justices of peace at General or Quarter Sessions, (except such necessary weapons as may be allowed him by them for defence of his person or house,) and that such armour, &c. shall be kept at the costs of the owner at such place as the justices shall appoint. If he or any person who shall have such armour, &c., to his use, shall refuse to discover it, or shall hinder the delivery thereof to the justices or to any person authorized under their warrant to take it, the armour, &c. shall be forfeited, and the party offending shall be imprisoned by any of the county justices' warrant, for three months, without bail or mainprise. Yet although the armour, &c. be so taken away, such recusant shall be charged with maintaining the same, and also with buying, providing, and maintaining horse, armour, and munition in such sort as others of her majesty's subjects.

Reliques, &c.

The 26th section enacts, that any two justices of the peace, and all mayors, bailiffs, and chief officers of cities

and towns corporate, in their jurisdictions, may search for popish books and reliques in the houses and lodgings of popish recusants convict. If the justices are of opinion that it is unmeet to allow the convicts to use any altar, pix, beads, pictures, or such like popish relique, or any popish book, which shall be then found in their custody, it shall be defaced or burnt, if it be meet to be burnt. If it be a crucifix or relique of any price, it shall be defaced at the General Quarter Sessions in the county where it shall be found, and then restored to the owner.

III.—THE OFFENCE OF NOT TAKING THE OATHS REQUIRED AT LAW.

Although the refusing to qualify under the Relief Acts deprives the offender, as we have seen, of almost all the benefit they were intended to give, still this is not the only consequence of such default. It is by several statutes made a substantive offence to refuse the oaths from time to time appointed to be taken by her majesty's subjects. Disobedience is punished by additional severities, and in certain cases it is even adjudged to be equivalent to conviction of popish recusancy. The only alterations effected under this head by the Relief Acts have been the abolition of the declaration against transubstantiation, and the substitution of another oath in lieu of those appointed by law at the several periods when the undermentioned penal acts were passed. The additional restraints to which Roman Catholics refusing to take and subscribe such substituted oath are now liable, are the following.

Parliament.

No Roman Catholic peer shall vote or make his proxy or sit in the House of Peers; and no member of the House of Commons shall vote or sit there, until such peer or member shall have taken and subscribed the oath appointed by 10 Geo. IV. c. 7, s. 2. The 30 Car. II. st. 2,

c. 1, ss. 5 and 6, declares that every such offender shall be adjudged a popish recusant convict to all intents and purposes, and shall forfeit and suffer as such, and shall be subjected to the particular disabilities and forfeitures to which, in the like case, popish recusants convict are made liable by that statute. (*Suprà*, p. 46.)

Offices of Trust, &c.

Sections 9, 12, and 13 of the last mentioned act enacted that any sworn servant to the king, who should not, within the time limited by law, take the appointed oath, and should advisedly come into or remain in the presence of the king or queen, or should come into the court or house where they were, or either of them resided, without a written license from the privy council, should forfeit his place and incur all the pains, penalties, forfeitures, and disabilities of that act. But these sections have been repealed by the 2 Geo. II. c. 31, s. 9, which recites that the provisions of a statute previously passed, (the 25 Car. II. c. 2,) were "as to those persons" sufficient. Under that statute, all Roman Catholics holding office, civil or military, or receiving pay, salary, fee, or wages, by royal patent or grant, or having command or place of trust under the crown, in England, Wales, Berwick, Jersey, or Guernsey, or in the navy, or any service or employment in the royal household, and who shall neglect or refuse to take the oath as such officers, &c. at the time and in manner required by law, and yet shall execute any of the said offices or employments after such omission, shall, upon conviction of that offence, be disabled to sue or use action, bill, plaint, or information at law, or to prosecute any suit in equity, or to be guardian, executor, administrator, legatee by will, or donee by deed, or to bear any office *in England, Wales, or Berwick*, and shall forfeit 500*l.*; the whole of which it seems will go to the crown.

It is singular that the repeal of the above-mentioned

sections of the 30 Car. II. st. 2, c. 1, should have escaped the notice of a learned author (*r*), and his successive editors.

Residing near London.

The lord mayor and justices of peace of London, Westminster, Southwark, Middlesex, Surrey, Kent, and Essex, are directed by 1 Will. & Mary, c. 9, s. 2, to cause to be brought before them in their respective jurisdictions all reputed papists in the said cities, or within ten miles of the same, not being tradesmen, mechanics, merchant strangers, ambassadors' servants, nor persons certified at sessions, and having no other place of abode, and tender to them the oath appointed by law. If any of them "refuse, audibly and solemnly," to take it, and shall yet remain within the said cities, or ten miles' distance from the same, such offender shall forfeit and suffer as a popish recusant convict. The third section enacts the like penalty against the person so refusing, if he do not, in the next term or sessions after refusal, appear in open court in the Queen's Bench, or at sessions, and take the oath there. To insure the execution of the law, justices of peace are directed to certify in the next term every subscription and every refusal into the Queen's Bench, or to the next Quarter Sessions.

Keeping Arms.

The 1 Will. & Mary, c. 15, enacts, that no suspected papist,—who shall neglect to take the oath appointed by law, when tendered to him by two justices of peace, or who shall not appear before them upon notice from one authorized by warrant under their hands and seals,—shall keep any arms, ammunition, or horse, above the value of 5*l.*, in his possession, or in that of any person to his use, (other than such as shall be allowed him by the sessions for defence of his house or person). Any two justices

(*r*) Bac. Abr. *Papists* (B), s. 2.

may authorize, by warrant, any persons to search for all such arms, ammunition, and horses, in the day-time, with the assistance of the constable or his deputy or tithing-man, and to seize them to the queen's use. The said justices shall deliver the arms and ammunition at the next Quarter Sessions in open court. Any such papist who shall refuse to discover and deliver his arms or ammunition, and whosoever shall conceal or be privy or aiding to conceal the arms or ammunition of such papist, or the horses of any such papist, shall be committed by any two justices' warrants to the common gaol for three months, without bail or mainprise, and shall, besides the forfeiture of such arms, ammunition, and horses, by the owner, forfeit treble their value to the queen. The sessions are directed to allow the full value of any concealed arms or ammunition to the discoverer of them, so as the same be seized.

Holding Property.

This will be noticed elsewhere (s).

Foreign Service.

The 3 Jac. I. c. 4, s. 18, is confined to the particular case of subjects of this realm going abroad to serve, or, being abroad, voluntarily serving any foreign prince, state or potentate, and not having before their departure taken the oath of obedience. This offence is declared to be a felony. The 19th and 20th sections further enact, upon pain of felony, that if the person so going abroad, or so serving, be a gentleman or person "of higher degree," or have borne the place of "captain, lieutenant, or any other place, charge, or office in camp, army, or company of soldiers, or conductor of soldiers," he must, moreover, enter into an obligation with two sureties in the sum of 20*l.* at the least, with condition, among other things, that he "shall not at any time thereafter be

(s) See *post*, p. 60.

reconciled to the pope or see of Rome." The 59 Geo. III. c. 69, commonly called the Foreign Enlistment Act, which makes all persons offending against its provisions liable as in misdemeanour, cannot be understood, however, to have repealed these sections of the 3 Jac. I. c. 4. That general act applies to all enlistments without license, such being the mischief it was intended to prevent. The clauses of the other act were not so designed. The mischief against which they were directed was the growth of popery; and they may be still enforced against such Roman Catholics as have not qualified under the Relief Acts.

Hanoverian Succession Oaths.

The oaths appointed by the 1 Geo. I. st. 2, c. 13, s. 10, and 6 Geo. III. c. 53, with the exception of the Abjuration of Papal Supremacy (31 Geo. III. c. 32, s. 18), may be tendered to Roman Catholics by two justices, if they have reasonable cause to suspect such of dangerous or disaffected principles. Persons may be deputed for the like purpose by order in council, or commission under the great seal. Refusal to take such oaths, or refusal to appear before the justices or other lawful persons, upon summons for the purpose, renders the party liable to be adjudged a popish recusant convict, and to forfeit as such. And the fact of such refusal shall be certified to the next sessions of the peace, and thence into the Queen's Bench or Chancery. (1 Geo. I. st. 2, c. 13, ss. 10, 11.)

IV.—PROMOTING OR PROFESSING POPERY.

The former treatises upon this portion of our criminal law have included within it the offences of hearing and performing popish services, keeping popish schools, buying or selling popish books, &c. The Commissioners of Criminal Law (*t*) have considered them as forming so many

(*t*) Sixth Report, pp. 105—7.

distinct classes, without any satisfactory reason, as it seems, for the change. The former method of classification has been preferred in this treatise.

Form of Prayer, &c.

The first enactment on this subject applies generally to all persons performing or assisting at any form of worship or ritual other than that of the Established Church. The 5 & 6 Edw. VI. c. 1, s. 6, as revived by 1 Eliz. c. 2, s. 2, and amended by 13 & 14 Car. II. c. 4, s. 24, forbids any person soever, inhabiting and being within England, Wales, or Berwick-upon-Tweed, from willingly or wittingly hearing or being present at any other manner or form of common prayer, administration of the sacrament, making of ministers, or any other rites contained in *The Book of Common Prayer, &c.*, than is mentioned and set forth in the said book, or contrary to the Uniformity of Service Act (2 & 3 Edw. VI. c. 1). Upon conviction at assizes, oyer and terminer, or sessions, of a first offence against this act, the punishment is six months' imprisonment without bail or mainprise; one year's imprisonment for a second offence; and for a third offence, imprisonment for life.

Saying Mass, or Hearing it.

The 23 Eliz. c. 1, s. 4, enacts, that whosoever shall say or sing mass shall forfeit 200 marks, and be committed to gaol for a year, and thenceforth until he shall have paid the fine; and every person hearing mass shall forfeit 100 marks and be imprisoned for a year. A third part of these money penalties is to go to the queen, another third part to the poor, and the remaining third part to the informer, (s. 11). This section also contains a general provision for the imprisonment of every person so convicted that shall not pay them within three months after judgment, until payment or conformity. Justices of peace, as well as other justices, are, by s. 8, charged with the enforcement of this statute.

The 11 & 12 Will. III. c. 4, s. 3, "for a further remedy against the growth of popery, over and beyond the good laws already made," imposes the penalty of imprisonment for life upon any popish bishop, priest, or jesuit saying mass, or exercising any other part of a popish bishop's or priest's office within these realms or the actual dominions thereof;—unless (s. 5) he be an alien residing in a foreign ambassador's dwelling house as chaplain, and registered as such in the secretary of state's office;—most probably the Foreign Office is here meant. To ensure the execution of this provision, any person apprehending and prosecuting to conviction, one or more popish bishop, priest, or jesuit, shall have for every such convicted offender the reward of 100*l.* within four months after such conviction, (s. 1).

This act is not among those referred to by the 31 Geo. III. c. 32. The 18 Geo. III. c. 60, s. 5, which repealed it in favour of such Roman Catholics as would consent to take the oath prescribed by the Relief Acts, specifically provides that no popish bishop, priest, or jesuit, shall take any benefit under that act, if he have not taken such oath before being apprehended or prosecution commenced. The 43 Geo. III. c. 30, and the 10 Geo. IV. c. 7, have the effect of substituting other oaths for that enjoined by the 18 Geo. III. c. 60, but do not seem to have in any way qualified the severity of the above-mentioned proviso.

Education.

Under this division of the subject, the laws against Roman Catholic education will be reviewed. They relate first to domestic, secondly to foreign education.

1. Popish Education at Home.

If any person or body politic or corporate shall keep or maintain "any schoolmaster," who shall not repair to church in manner mentioned above, (see "RECUSANCY,")

or who shall not be allowed by the bishop or ordinary of the diocese where such school is kept, shall lose 10*l.* for every month so keeping him. And “such schoolmaster or teacher,” presuming to teach, shall, upon conviction, be disabled to be “a teacher of youth,” and be imprisoned for one year without bail or mainprise. (23 Eliz. c. 1, ss. 6, 7.) Ushers and other assistants in schools have been held to be within the meaning of this act (*u*).

If any man shall, without special license from the archbishop, bishop, or guardian of spiritualities in the diocese, keep school or be a schoolmaster, out of the Universities, colleges, or public or free grammar schools of the realm, except it be in the house of some man or woman of noble or gentle degree, not being a recusant, the schoolmaster so offending, and also the party retaining or maintaining him, shall each forfeit for every day that they shall so offend, 40*s.*, to be divided between the queen and the informer. (1 Jac. I. c. 4, s. 9.)

By the 13 & 14 Car. II. c. 1, “schoolmasters or other persons instructing or teaching youth in any private house or family as tutors or schoolmasters,” must first obtain a license from their archbishop, bishop or ordinary, for which they shall pay 12*d.*, and take the oath appointed to be taken by Roman Catholics. Every first offence is punishable with three months’ imprisonment without bail or mainprise; every subsequent offence with the like imprisonment, and a fine of 5*l.* to the crown.

The penalties of the 11 & 12 Will. III. c. 4, s. 3, are expressed to be “over and beyond the good laws already made.” Any papist who shall keep school, or assume the education, government, or boarding of youth, within the realm or its actual dominions, shall, upon conviction, be sentenced to perpetual imprisonment.

(*u*) Com. Dig. tit. *University* (D).

2. *Popish Education abroad.*

By the 27 Eliz. c. 2, s. 6, it is punishable, as in a præmunire, for any one born within the queen's obedience to send relief, directly or indirectly, if done wittingly and willingly, out of the realm and its actual dominions, to any jesuit, priest, deacon, religious, or ecclesiastic born within the realm or its actual dependencies, and ordained or professed by authority from Rome, or to any jesuit college, or foreign seminary, or person of or in the same, not returned into the realm with submission and continuing in it. By the 1 Jac. I. c. 4, ss. 6, 7, it is enacted that all persons under the queen's obedience, sending any child or other person under their government, into any foreign parts out of the queen's obedience, with intent to enter or reside in any college, seminary, or house of jesuits, priests, or other popish order, profession, or calling; or to be instructed, persuaded, or strengthened in the popish religion, or to profess the same, shall, for every such offence, forfeit 100*l.* to the queen. And the person so passing or sent, shall be personally, but not in respect to his or her heirs or posterity (*x*), disabled to inherit, purchase, take, or enjoy any real or personal estate whatsoever in England or its then actual dominions; and all trusts, confidences, and interests whatsoever for his or her benefit shall be utterly void. It seems uncertain whether the 100*l.* will go to the informer or to the crown, notwithstanding the express language of this act, it being doubtful if the 11 & 12 Will. III. applies to it or not. (*Post*, p. 58.)

(*x*) In *Thornby v. Fleetwood*, 10 Mod. 113, it was held that an estate tail being within the meaning of this enactment, the life-interest only of the first taker under the limitation was forfeited by his having been educated abroad contrary to the act,

and that, too, only during nonconformity. It therefore followed, that neither the estate tail, nor his right to suffer a recovery in respect of it, were affected by the disability so qualified.

No woman, nor child within the age of 21 years, not being a sailor, ship-boy, or apprentice, or factor of some merchant in trade of merchandize, shall pass the seas without the queen's or six privy councillors' written license. It is not required, however, to be sealed. The officer of the port "willingly or negligently" suffering their passage, or not entering the names of such licensed passengers, shall forfeit office, and all his goods and chattels; and the owner of the vessel "wittingly or willingly" carrying such unlicensed persons, shall forfeit the vessel and tackle; and every master or mariner "of or in" such vessel, shall forfeit all their goods, and be imprisoned for twelve months without bail or mainprise. (1 Jac. I. c. 4, s. 8.) The children and women so passing without license are only punishable as for a simple misdemeanour under this section; but by a statute passed a few years after (3 Jac. I. c. 5, s. 16), the children were made liable to almost the same penalties as though they had passed the seas with the intent mentioned in the 6th section of the 1 Jac. I. c. 4. It is forbidden to the children of any subject within the realm, (the said children not being soldiers, mariners, merchants, or their apprentices or factors,) to be sent or go beyond seas, without the queen's license, or the license of six privy councillors, (the principal secretary to be one,) "under their hands and seals." It is enacted that no such child so offending shall take any benefit, by "gift, conveyance, descent, devise, or otherwise," of any real or personal estate whatever, until he, being of the age of eighteen years, takes the oath prescribed at law, before a justice of peace for the dwelling place of the child's parents; and that in the meantime his or her next of kin, not being a popish recusant, shall have and enjoy the subject matter of such gift, conveyance, descent, or devise, until such child shall comply with the requisitions of the law; upon which such next of kin shall make account of his or her receipts, and in a reasonable time repay and restore them. The same section imposes on the party so sending such

children, the penalty of 100*l.*, to be apportioned in equal thirds, between the queen, the poor, and the informer. But if the 11 & 12 Will. III. c. 4, s. 6, apply to this act, which, with submission to the learned Commissioners of Criminal Law, there is but little reason to doubt, the whole of the fine will now go to the informer. That section recites the statute of 1 Jac. I. c. 4, correctly enough, but mis-recites the particular terms of the 4th section. It mis-states the forbidden sending beyond seas to have been one with intent to educate “in the Romish religion,” whereas in that act there is no mention made of the religion, but only “to prevent their good education in England, *or for any other cause.*” And the apportionment of the penalty is incorrectly recited to have been made in equal moieties between the crown and the informer, the poor’s third not being noticed. But these trivial inaccuracies in the preamble cannot affect the operation of the plain and unambiguous enacting clause. If it be so, however, it is difficult to understand the reasons which have led the learned commissioners to the conclusion, that the act intended to be recited must have been the 1 Jac. I. c. 4, between the language of which act, and that of the recital in the 11 & 12 Will. III. c. 4, there is far less resemblance than there is between the latter and the 3 Jac. I. c. 5, s. 16 (*y*).

It is also enacted by 3 Car. I. c. 2, that no one, being under the queen’s obedience, shall pass or go, or convey or send, or cause to be sent or conveyed, any child or other person, out of any of the queen’s dominions into parts beyond seas, out of her obedience, *to the intent* to enter, or be resident or trained in any priory, abbey, nunnery, popish university, college, or school, or house of jesuits or priests, or private popish family, *and* shall *there* be by any jesuits, seminary priests, friar, monk, or other popish person, instructed, persuaded, or strengthened in the popish religion in any sort to profess the

(*y*) Sixth Rep. of Cr. L. Comm. p. 109 (*k*).

same. It is also forbidden to convey or send, or cause to be conveyed or sent, money, "or other thing," for the maintenance of any child or person already gone or sent, or to go or be sent, "AND trained and instructed as aforesaid," or towards the relief of any priory, abbey, nunnery, college, school, and religious house soever. Conviction of either of these offences will disable the party to sue at law or in equity, to be committee of any ward, executor, administrator, legatee or donee (by deed) of any person, or to bear any office within the realm; and such convict shall forfeit all his goods and chattels, and, during life or the continuance of his non-compliance, all his lands and hereditaments, rents, annuities, office, and estates of freehold. It has been decided (z) that the 3 Jac. I. c. 5, and the 3 Car. I. c. 2, did not repeal the 1 Jac. I. c. 4, but were made to explain, amend, and enforce it. It is difficult to understand how any doubt upon the point could have arisen. The rule is clear that all acts *in pari materiâ* are to be construed in the same manner, and to be read together as they would be, if they formed one act. Generally, unless the provisions of the Popery Acts are manifestly inconsistent, and incapable of being so construed, they must all be taken as consolidated in one enactment. Where they are inconsistent with one another, the later provision must be taken to be the law, and the earlier one to have been repealed by it.

Among acts prohibited as tending to the promotion of popery, the giving relief to persons guilty of that offence is included by express enactments.

Relieving Recusants.

Whoever shall willingly maintain, relieve, keep, or harbour in his house any servant, sojourner, or stranger, who shall forbear the established worship, without reasonable excuse, for a month together, shall for every month

(z) *Thornby v. Fleetwood*, 10 Mod. 113.

that he shall so maintain, &c., forfeit 10*l*. (3 Jac. I. c. 4, s. 32.) And by s. 33, the same forfeiture is incurred by keeping such recusant “in service, fee, or livery.” But this prohibition does not extend to one’s father or mother being *bonâ fide* without a home or sufficient maintenance, nor to one’s ward, nor to any person committed by authority to one’s custody. (s. 34.)

Protestant Children.

Among the disabilities of Roman Catholics, the boon held out by the legislature to the conforming children of such, ought to be classed; as being of a strictly penal nature. “To the end that the protestant children of popish parents may not, in the lifetimes of such their parents, for want of fitting maintenance, be necessitated, in compliance with their parents, to embrace the popish religion contrary to their own inclinations,” the 11 & 12 Will. III. c. 4, s. 7, enacts, that upon complaint of such refusal to the Lord Chancellor, Lord Keeper or Commissioners of the Great Seal, such order shall be made therein “as shall be agreeable to the intent of that act.” An almost similar enactment was passed in the following reign, (1 Ann. st. 1, c. 30,) for the protection of Jewish conformists. Under that act it was decided by Lord Macclesfield (*a*), that it is not necessary that the application for relief should be made during minority. In that case the protestant child of the Jewish father was above forty, when she made her application to the court.

V.—DISABILITIES AS TO PROPERTY.

For reasons which will be evident to the reader, this subject has been reserved for a separate investigation in this place. It is conceived that the effect of the 10 Geo. IV. c. 7, s. 23, has been to abolish, unconditionally, and

(*a*) *Vincent v. Fernandez*, 1 P. W. 524.

in all cases whatever, those incapacities of taking by descent or purchase any interest, real or chattel, in lands and other hereditaments, which were enacted by the 11 & 12 Will. III. c. 4, 3 Geo. I. c. 18, and 11 Geo. II. c. 17, against all papists refusing to take the oaths of allegiance and supremacy. The 18 Geo. III. c. 60, ss. 1 and 4, relieved from these incapacities all papists taking and subscribing the oath thereby appointed, but on no other terms. The 43 Geo. III. c. 30 made no other alteration of the law on this head, than the substitution of the oath contained in the 31 Geo. III. c. 32, in the room of that required by the 18 Geo. III. c. 60, and also the enlargement of the time for taking it, limited by the latter act. There was no further legislation upon this subject down to the passing of the 10 Geo. IV. c. 7. The law, then, in 1829, as it was settled by those acts, made all Catholics, declining or omitting to take the oath appointed by the 31 Geo. III. c. 32, incapable, as to themselves personally, "to inherit or take by descent, devise or limitation, in possession, reversion, or remainder, any lands, tenements or hereditaments, within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed;" and empowered their protestant next of kin to enjoy the same during the lives of such nonconformists, without being accountable to them for the receipt of profits, nor for any but wilful waste. Their posterity, however, were not disabled by their parent's nonconformity from inheriting or taking in either of the ways above-mentioned. But all purchases, whether legal or equitable, of "manors, lands, profits out of lands, tenements, rents, *terms*, or hereditaments, within" the above-mentioned limits, and all "*estates, terms, and any other interests or profits whatsoever out of lands*," in any way legally or equitably granted or conveyed to the benefit or relief of such papists, were made, without any exception as to heirs or posterity, "utterly void and of none effect, to all intents, constructions, and purposes whatsoever." Such was the state of the law when the 10 Geo. IV. c. 7

was passed. By section 23 of that act it is enacted that thereafter “no oath or oaths shall be tendered to or required to be taken by her majesty’s subjects professing the Roman Catholic religion, *for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to and required to be taken by her majesty’s other subjects; and*” that the oath appointed by that act “shall be of the same force and effect to all intents and purposes as, and *shall stand in the place of all oaths and declarations required or prescribed by any law then in force for the relief of her majesty’s Roman Catholic subjects from any disabilities, incapacities, or penalties.*” It is quite clear that no practical difficulty under this incoherent section can ever arise as to Catholics who have taken the oath; because, in any view of its meaning, such persons are altogether secure from the ancient disabilities. It is conceived, too, that the courts will be more inclined to extend this remedial clause than to narrow it; and that the exception in the prohibitory part of this clause of such “as may by law be tendered,” &c. to the other subjects of the realm, will be liberally construed to mean such as may be tendered to such other subjects “for enabling them to hold or enjoy any real or personal property;” *viz.*, none at all. If this be not the sense of those words, it is clear that under this clause the oaths appointed by the 1 Geo. I. st. 2, c. 13, and 6 Geo. III. c. 53, and which two justices, by s. 10 of the former act, may tender to *any person or persons* whom they shall or may suspect to “be dangerous or disaffected,” must be taken by all such Roman Catholics as will not take the Roman Catholic oath, to enable them to obtain their exemption from the disabling statutes referred to above. In like manner the courts will, it is to be supposed, interpret the passage substituting the new oath in the room of “all oaths,” &c. as meaning “all other oaths,” and thus give effect to the whole clause, which, if literally construed, manifestly contradicts in the latter passage what is expressed by the first. It is certainly very desirable that

all doubt on a matter of so much importance should be at once set at rest either by the courts or by the legislature.

VI.—ECCLESIASTICAL CENSURES.

It ought to be mentioned, that in addition to the penalties and disabilities with which popery and popish recusancy are still punishable at law, it is competent to the ecclesiastical courts to take cognizance of the same offences, and punish them by excommunication and otherwise. It is generally provided by the principal penal acts, and particularly by the 3 Jac. I. c. 4, s. 39, and the 3 Jac. I. c. 5, s. 30, that they shall not extend to take away or abridge the authority or jurisdiction of the ecclesiastical censures for any cause or matter, but that her majesty's commissioners in causes ecclesiastical, archbishops, bishops, and other ecclesiastical judges, may do and proceed as before those acts were passed.

It may not be out of place, before concluding this chapter, to remark that, besides the encouragement held out to *qui tam* informers by the penal statutes passed against Roman Catholics, the legislature and the Established Church have taken every precaution to prevent the defeat or evasion of those enactments. In the course of this treatise some of the clauses contained in them for giving effect to their provisions have more than once been noticed. The principal ones that have not yet been referred to are now about to be enumerated under the concluding head of this chapter.

PRESENTMENT OF PAPISTS AND RECUSANTS.

Churchwardens are officers of the parish in ecclesiastical affairs, as constables are in civil; and one main branch of their duties is to present all matters happening in the parish, contrary to the ecclesiastical laws.

And they are to be considered, in a certain degree, as guardians of the moral character and public decency of their parish (*b*). By the 6 Edw. VI. c. 1, s. 2, the 1 Eliz. c. 2, s. 14, and the 3 Jac. I. c. 1, s. 2, they are to present such as do not come to church (*c*). By the 3 Jac. I. c. 4, ss. 4, 5, 6, 36, they and the constables of every town, parish, or chapel, or one of them, or if there be none such, then the chief constable of the hundred where such town, parish, or chapel shall be, shall once a year present at the sessions the monthly absence from church of all popish recusants, and the names of their children, nine years old and upwards, abiding with their parents; and, as near as they can, the age of every such child, as also the names of their servants. These presentments are to be recorded by the clerk of the peace or town clerk, without fee. The churchwardens, constables, or high constables, are to have 40s. for every conviction upon a first presentment of such monthly absence, to be levied by the justices' warrant out of the recusant's goods and estate. And for failing to make such presentments, the offenders shall forfeit 20s. for each default. For failing to record the presentment when made, the clerk of the peace or town clerk shall forfeit 40s. in each case. These sums may be recovered in Queen's Bench, at assizes, or at sessions.

By 1 Can. 110, if the churchwardens or questmen, or assistants, shall know any man within their parish or elsewhere, that is a fautor of usurped or foreign power by the laws of this realm, or a defender of popish and erroneous doctrines, they shall present the same to the diocesan or ordinary, to be censured and punished according to ecclesiastical law. By 2 Can. 114, parsons, vicars, and curates are required to inform themselves once a year, and, under pain of suspension, truly present to their ordinaries, before St. John Baptist's Day, how many popish recusants, men, women, and children, above

(*b*) *Griffith v. Reed*, 1 Hagg. Con. R. 208.

(*c*) Cro. Eliz. 750.

the age of thirteen years, and how many popishly given persons, (coming to church but refusing the communion,) are inhabitants, sojourners, or guests in their several parishes; setting down the real or reputed names of such recusants, and distinguishing absolute from half recusants. All such ordinaries and other ecclesiastical officers to whom the said presentments are exhibited, are required, under pain of half a year's suspension by the bishop for each neglect, within one month after receipt of them, to deliver them to the bishop, who shall within six weeks exhibit them to the archbishop, by whom, within other six weeks, they shall be exhibited to her majesty (*d*). If the churchwardens omit to present any particulars of which there is a common *fama* in their parish, they may be compelled to do so by their ordinary at his visitation. If they refuse to obey him, they may be proceeded against as wilful breakers of their oath, and in the *interim*, be barred the communion by the parish ministers (*e*).

The Relief Acts have by no means altered the duties and liabilities of these various officers. They are still bound to make the presentments under the penalties above specified. But the Roman Catholics so presented, are empowered by those acts to allege them by way of defence to any prosecution for recusancy, &c., where they can show that they have qualified agreeably to their provisions.

(*d*) Burn's Eccles. Law, *Popery*, xli.

(*e*) Prideaux, 4; Canons, 26, 117; Gibbs. on Visit. 59, 60.

CHAPTER V.

PRÆMUNIRE.

ALTHOUGH frequent mention has been made of præmunire and its consequences in the course of this treatise, it was thought to be more advisable to defer any explanation of the term until we came to consider the question in its general bearing on the existing circumstances of English Roman Catholics.

Præmunire, corrupted from *præmonere*, is the initial word in the first sentence of the writ to which it gives its name. By that writ the sheriff or other minister is commanded to forewarn (*præmonere*) the person against whom it is issued to appear to answer within two months for the contempt upon which it is founded, *viz.*, the drawing the queen's subjects out of the realm, in plea whereof the cognizance belongs to the queen's courts, or wherein judgment has already been given in the same (*f*). The courts before which the offender may be summoned, are specified by the act to be the council or parliament, the Chancery, the justices of the two benches, or the justices deputed for that purpose. What the punishment upon conviction under this act is to be, does not appear upon the face of it; but it is provided, that if the offender does not appear by the day appointed him in the writ, he, his procurators, attornies, executors, notaries, and maintainers, shall be put out of the queen's protection, forfeit their lands, goods, and chattels to the crown, and be imprisoned and ransomed at the queen's will; and that on the return of *non est inventus* to the writ issued under the award of *capiatur*, they shall be put in

(*f*) 27 Edw. III. st. 1, c. 1.

exigent and outlawed. And it is said by learned writers, that the ordinary judgment in a præmunire where the offender has appeared, is, that he be put out of the queen's protection; his lands and tenements, goods and chattels, forfeited to the queen; and that his body shall *remain* in prison at the queen's pleasure (*g*). A further provision is made by the 38 Edw. III. st. 2, c. 1, which recites "the great hurt, perils, and importable losses and grievances, because of personal citations out of the Court of Rome by feigned and false suggestions and propositions against all manner of persons of the realm, upon causes whose cognizance and final discussing pertaineth to" the crown and its court. All who shall obtain, purchase, or pursue such personal citations against the queen or any of her subjects, and all their maintainers, counsellors, abettors, aiders, and fautors, shall be taken by the sheriffs and the justices in their sessions, deputies, bailiffs, and other ministers, and presented to the queen or her council, by good, sufficient, and short bail, there to receive what the law will give them. And upon conviction they shall abide in prison without mainprise, bail, or deliverance, until they have made fine and redemption to the queen at her pleasure,—*gree* to the party aggrieved,—and full remuneration, with good security of ever attempting the like for the time to come, or of suing any process whatever in respect of such imprisonment, remunerations, or other matters thereon depending, against any man, either in the Court of Rome or any where else. Any justice of the peace, on his own knowledge, or on complaint of others, may cause any person to be apprehended for such offence, take his examination and the evidence of material witnesses, and bind the latter over to the Queen's Bench or gaol delivery (*h*). By the 16 Rich. II. c. 5 again, it is in general terms provided, that any one who shall purchase or pursue, or cause to be purchased or pursued in

(*g*) Co. Litt. 129 b; 2 Hawk. P. C. c. 48, s. 9.

(*h*) 2 Hawk. c. 8, s. 34; Hale's Sum. 168.

the Court of Rome, or elsewhere, *any thing whatsoever* which toucheth the queen, against her, her crown and regalty, or her realm; any one who shall bring into the realm, or receive or make notification or execution of such within the realm or without; and their notaries, procurators, maintainers, abettors, fautors, and counsellors, shall be put out of the queen's protection, their lands, tenements, goods and chattels shall be forfeit to the queen, and they themselves shall be attached by their bodies if they can be found, and brought before the council, there to answer. Otherwise the writ of præmunire may be resorted to against them in manner provided by the former statutes. This act of 16 Rich. II. c. 5, is the one to which almost all the subsequent statutes refer in enacting against new offences the penalties of præmunire. From this circumstance, rather than from any more reasonable cause, it has generally been called *the Statute of Præmunire*.

These are the only provisions in the ancient acts, passed in derogation of papal jurisdiction, which seem applicable to Roman Catholics in England at the present day. The law of provisors and purveyors is out of date as far as they are concerned. That law regards the benefices and endowments of the Established Church, and therefore any mention of it would be out of place in a book not treating of the laws and immunities of that Establishment.

But it is clear, upon principle, that the provisions cited are perfectly applicable to English Roman Catholics and their suits at this day. Whatever controversies may arise among them as to matters cognizable at law or in equity, cannot be adjudicated at Rome or by authority derived from Rome, without the peril of præmunire and all its liabilities above enumerated. For the Relief Acts were not intended to alter the laws passed previously to the Reformation against the authority of the holy see, but only to mitigate some of the severities enacted against the Roman Catholics subsequently to the establishment of

Protestantism as the religion of the land. And it may be even doubted whether some of the enactments of the reign of Henry VIII., touching intercourse with Rome, are not still in force against Roman Catholic as they certainly are against protestant offenders. There is not a section in any of the Relief Acts, that even recites the statutes passed in Henry's reign, nor their revival by the 1 Eliz. c. 1. And the only ground of doubt, as to their being in force at the present day, is furnished by the vague terms of the 4th section of the 31 Geo. III. c. 32, whereby Roman Catholics taking the oath are secured from being presented, indicted, sued, &c. "for being a papist, . . . or for being present at, or performing or observing any rite, ceremony, *practice, or observance of the popish religion, or maintaining or assisting others therein.*" But, however strong this language may be considered to be, and however comprehensive an interpretation it is capable of receiving, it deserves remark that the preamble to this section does not mention either of the statutes of Henry, nor indeed any earlier act than that of the 23 Eliz. c. 1. It then enumerates a great number of other acts of nearly the same description, and recites, that by these various enactments, "papists, . . . persons saying or hearing mass, or being present at, or conforming to, or performing or observing any rite, ceremony, *practice or observance* of the Church of Rome, or *maintaining or assisting others therein,*" are made liable to the penalties contained in those acts. It is difficult to say that the enacting part of the section which follows this recital was designed to embrace more than the cases therein set forth, or that the words "*practice or observance*" comprehend the right of appeal to Rome, or indeed any other practice or observance that is not in the nature of a "rite or ceremony." Possibly, however, by a large construction of a remedial enactment, the courts will hold that, with the exemption from prosecution as a papist, the legislature intended to afford to every Roman Catholic the free exercise of all those usages of his ecclesiastical

discipline, without which the headship of the pope would be deprived of much of its practical importance. Notwithstanding this impression, the author still feels it his duty shortly to advert to the main provisions of Henry's acts.

By the 24 Hen. VIII. c. 12, s. 4, it is enacted, that if any person residing within the realm or its actual dominions or marches, "or any other person or persons," shall, for any causes testamentary or matrimonial, divorces, tithes, oblations or obventions, attempt, move, purchase or procure from or to the see of Rome or other foreign court, any foreign process, inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints or judgments, or execute any such, or do any thing to the let, impediment, hindrance or derogation of any process, sentence, judgment or determination in any courts of the said realm, dominions or marches, for any of the above causes, every such offender, his fautors, comforters, abettors, procurers, executors, and counsellors, upon conviction, shall be liable for every default, to the pains, penalties, and forfeitures ordained by the Statute of Præmunire, 16 Rich. II. c. 5.

The 25 Hen. VIII. c. 19, s. 3, forbids any appeals whatever to be had, provoked, or made out of the realm or its actual dominions, to the bishop of Rome or see of Rome, "in any causes or matters happening to be in contention, *and* having their commencement and beginning in any of the courts" of the said realm or dominions. And such appellants, and persons executing process of the see of Rome, and their respective aiders, counsellors and abettors, are, by section 5, made liable to the penalties of the above-mentioned Act of Præmunire.

These two enactments are confined to appeals. But the same penalties are enacted by the 25 Hen. VIII. c. 21, ss. 3, 20, and 22, against any subject of the said realm or dominions suing to the pope or the Roman see for "licenses, dispensations, compositions, faculties, grants, rescripts, delegacies, or any other instruments or writings"

whatsoever,—any person resiant in any of the actual dominions going abroad for any visitation, congregation, or assembly for religion,—and any person so subject or resiant, attempting or doing anything contrary to that act, or maintaining, allowing, admitting, or obeying any manner of censures, excommunications, interdictions, or other process from Rome, of what name or nature soever, to the derogation or let of the execution of the act, or of anything to be done by reason thereof.

Punishment of Præmunire.

The pains, penalties, and forfeitures of a conviction under the statute of 16 Rich. II. c. 5, improperly called the Statute of Præmunire, have been already enumerated in the words of the statute book. But as such frequent reference to the consequences of a præmunire is made by the latter penal enactments, a brief summary of them will not be out of place here.

1. We have seen that the attainted person is “put out of the queen’s protection.” This applies to private injuries, however atrocious. He can bring no action whatsoever, and it is doubtful whether he is entitled to surety of the peace (*i*). For the law will not guard his civil rights nor remedy his individual grievances. And no man knowing him to be guilty, can, with safety, give him comfort, aid, or relief; for the abettors, comforters, maintainers, &c. of such persons are likewise included in the Statutes of Præmunire (*k*).

Still the delinquent is a part of the public, and has a right to the queen’s protection in respect of public wrongs. It was formerly thought otherwise, and that any man meeting him might slay him. But the law is now clearly settled to the contrary (*l*).

(*i*) Co. Litt. 130 ; 1 Hawk. P. C. c. 19.

(*k*) 1 Hawk. P. C. c. 19 ; 4 Comm. p. 108. But it seems they must

be proceeded against as principals. Stamford. P. C. 44 ; Plowd. 97.

(*l*) Co. Litt. 130 ; 12 Co. 68 ; 4 Comm. 107.

2. "His lands, tenements, goods, and chattels are forfeited to the queen." It is doubtful whether the forfeiture has relation to lands vested in the delinquent at the time of his committing the offence, or merely to such as were vested in him at his attainder. The better opinion, however, is, that it relates only to the latter. The point was raised in *Grosse v. Gayer* (*m*), where the defendant claimed under an estate tail granted by one Treegoose, the tenant in fee, who had theretofore incurred a præmunire, but at that time was not attainted of it. The point, however, was not decided, as the defendant obtained judgment on another point.

The forfeiture, however, is confined to fee simple and life interests in lands and tenements. For it must be understood of such an estate as the offender may lawfully forfeit. Therefore if tenant in tail be attainted in a præmunire, he shall forfeit the land only during his own life, and afterwards his issue shall inherit; for the words in the Acts of Præmunire are too general to take away the force of the statute *de donis* (*n*).

It is said that the Acts of Præmunire do not extend to the forfeiture of rents, annuities, fairs, &c., or any hereditaments that are not within the word *terræ* (*o*). But this is at least questionable. The acts speak of tenements as well as lands; and under the former word incorporeal tenements are included, such as rents, estovers, commons or other profits whatsoever granted out of land (*p*).

3. "His body shall remain in prison at the queen's pleasure." Other authorities have it that it shall be during the life of the delinquent (*q*). But this is only another form of expression for the same thing; as the queen, by her prerogative of pardon, may at any time remit the whole or any part of the imprisonment or

(*m*) Cro. Car. 172. See Jon. 217.

(*o*) 3 Inst. 126.

(*n*) Co. Litt. 130 a, 391 a; 1 Roll. Rep. 92.

(*p*) Co. Litt. 19 a, 20 b.

(*q*) 1 Bulst. 199.

forfeiture, except in the case of transgressing the statute of Habeas Corpus (*r*).

Unless it be specially enacted to the contrary, a peer of the realm cannot claim his privilege of trial by his peers in an indictment for a præmunire (*s*). Whether peer or commoner, the defendant must appear in person, unless dispensed with by writ or grant. In the case of Sir Andrew Mildmay (*t*), he pleaded his pardon by attorney, but it is thought that there was a grant to this effect in the pardon (*u*).

A pardon of all misprisions, trespasses, offences and contempts, includes a præmunire (*x*).

(*r*) 2 Bulst. 299 ; 4 Comm. 107.

(*u*) 2 Hawk. P. C. 273.

(*s*) *Lord Vaux's case*, 12 Rep. 92.

(*x*) Cro. Jac. 336.

(*t*) 2 Bulst. 290.

CHAPTER VI.

ROMAN CATHOLIC USAGES AS THEY AFFECT PROCEEDINGS
IN COURTS OF JUSTICE.

THE indirect consequences of the Relief Acts were of a most valuable nature. From the period of their enactment the Roman Catholic religion ceased to be alien to the constitution. So soon as the profession of that religion was no longer incompatible with citizenship, all former presumptions in law unfavourable to the rights of citizenship or their exercise by Roman Catholics received their death-blow. By express enactment the legislature had tolerated the religion of Rome. Therefore now "it was more than connived at,—it was protected,—it was established" (*y*), so far at least as those Roman Catholics were concerned, who were disposed to comply with the conditions of the Relief Acts. They are entitled to have their peculiar usages respected both in parliament and by courts of justice, especially in matters of conscience. Should a case of first impression arise in which the question will have to be determined whether by a liberal consideration the scruples of Roman Catholics shall be reconciled with the existing law, or by a different consideration these shall be brought into conflict with those, there is no doubt whatever that upon principle the liberal construction ought to prevail.

It is of frequent practice among Roman Catholics, to meet with religious duties, not in themselves directly opposed to the law, but which, if admitted by the law, will certainly very much qualify in particular

(*y*) See Lord Mansfield's dictum in *Evans's* case, *Furneaux's Letters* to Blackstone, Appendix, 2nd edit.; 3 Meriv. 375-6, note.

instances its general operation. Thus it is declared by the Council of Trent (z), in affirmance of previous decisions of popes and councils, that the Roman Catholic sacrament of penance has three distinct and indispensable parts; viz., contrition, confession, and satisfaction;—that these are all of divine institution;—that in confession the penitent is bound to confess all and singular his grievous sins, open and hidden, so far as his memory will serve;—that such confession must be made at least every Easter, and with the effect of receiving absolution from the minister;—and that no minister can absolve, who is not in priest's orders.—The wilful omission of annual confession with absolution subjects the party to excommunication *ipso facto*; and the wilful omission of any material circumstance vitiates the whole of the confession and renders the absolution null. In short, the obligation of plenary confession is one which it is impossible for a Roman Catholic to evade without palpable injury to his conscience. On the other hand, the duty of hearing confessions is so binding upon the priests, that they cannot deny that office to any applicants; although they may refuse to give absolution afterwards. They are also in the strongest manner bound to an inviolable secrecy as to what they hear even from unworthy penitents. The seal, as it is called, is of divine right, most strictly binding the priest,—in every case, even where the welfare of the whole realm is at stake, and even after the death of his penitent,—to reveal nothing that he has heard in confession, or in order to sacramental absolution, that that sacrament be not rendered intolerable or hateful to the people. And there is the same obligation upon him even where he is in doubt as to whether he heard the matter in question in confession or not (a). Nor is this an unreasonable ordinance. If the priest were allowed

(z) Sess. XIV. Can. 1 to 15. De Sanctissimo Pœnitentiæ Sacramento; and the Const. Antiq. Jur. in the Appendix.

(a) 1 Alphonsus de Ligorio, Theol. Mor. Lib. vj. n. 634, and Praxis Confessarii, 117.

to disclose what he may have heard in this way, no man would make a confession at all, or at least not a perfect confession, and thus the discipline of the Roman Catholic Church would be defeated, and its members deprived of the benefit of the sacrament of penance, and, indeed, of all its sacraments, except baptism, for, to all the rest, that of penance is, in general, a preparative of indispensable necessity. Accordingly, the seal of confession has obtained protection not only in the ecclesiastical courts of Roman Catholic states, but generally in all the courts of all countries where the exercise of the Roman Catholic religion is sanctioned by law. Perhaps the latest instance of its formal recognition by a court of law is that which is recorded to have taken place in the United States about five years ago.

The law of England recognizes the principle, that however desirable the discovery of truth may be, in the administration of public justice, there are cases where the mischiefs resulting from judicial investigations may be of such gravity as to counterbalance the advantages, and to call for a qualification in the rigour of the general rule. Thus, communications made to a counsel, attorney or solicitor, on the footing of professional confidence, cannot be disclosed by them in a court of justice against the client's will, however willing they themselves may be to disclose them. And their clerks are in the same situation in these respects as themselves, and so also are interpreters or agents, where such have been employed as the channels of communication in such cases^(b). All matters of evidence also are jealously excluded by the courts, of which the disclosure would be contrary to public policy, or calculated to injure the public interests. Communications that may have passed between the executive and

^(b) *Wilson v. Rastall*, 4 T. R. P. 195; *Foote v. Hayne*, R. & M. 756, 759; *Du Barre v. Livetti*, 165. *Peake*, 78; *Taylor v. Foster*, 2 C. &

its informers or police agents, local information which an officer of government may have acquired in that capacity, official correspondences, and even the language and arguments used by a party to an action in his place in parliament, have all been solemnly held to be confidential and privileged, and not to be disclosed even in courts of justice (c). But these specific instances are as yet the only recognized illustrations of the rule as to professional and confidential privilege. Protestant clergymen, medical men, bankers, and stewards, are among the classes to which this rule has been held not to extend (d). At an earlier period it seems to have been held by the Irish courts, that confessions to Roman Catholic clergymen were not privileged (e). It is doubtful whether this were ever the rule in England. But it is apprehended that, even if it were formerly, it cannot be maintained at this day. The operation of the Relief Acts has been to recognize the rights of the Roman Catholics in relation to their religious doctrines and ritual. It is evident that the intention of those acts was to secure them against all the temporal consequences at that time likely to follow from their obedience to the dictates of conscience, and the commandments of their church. It is evident that if their sacramental confessions be not now privileged, and if their priests be now liable to the alternative of committing a sacrilegious violation of the seal of secrecy, or of refusing to answer and being punished as for a contempt of court, one of the most serious of the former consequences of adhering to conscience and the church will have remained in force, and the Relief Acts in a great measure have been frustrated. It may even be contended, that the rule of public policy applies here. The law has chosen to recognize and sanction the official character of the priest, and to permit the relation between

(c) See the cases collected in
Phill. Evid. 8th edit. ch. 11, s. 4.

(e) *Butler v. Moore*, M'Nally on
Evid. 253.

(d) *Id.* s. 3.

himself and his flock to exist, and even to chastise with severity such as endeavour to disturb them while assembled in that relation. To receive from him afterwards, in defiance of the sacred obligations and the solemn trust he has been allowed to undertake, a disclosure which can only be made by an act of sacrilegious perjury on his part, would be a procedure too contrary to decency, morality, and policy, to warrant the supposition of its ever again being tolerated, far less enforced, by an English court of justice.

It is true that in *Gilham's* case (*e*) it was decided that the privilege did not extend to clergymen. But throughout that case it is manifest that the court had protestant clergymen, and more particularly clergymen of the Establishment, in its view; and there is nothing to show that the practice of auricular confession was once alluded to by the court. But even if it were, there is no analogy whatever between the seal of confession as understood in the Church of Rome, and the obligation to secrecy as understood in the Established Church;—the only one among all the protestant denominations of this country in which auricular confession is practised. In the former, as we have seen, the seal admits of no qualification or exception; “even where the welfare of the whole realm is at stake, and even after the death of the penitent,” it is binding still. But in the Church of England it is far otherwise. By the 113th canon, empowering ministers to present offences at the court of visitation, it is provided that, if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, he shall not in anywise be bound by this constitution, but is strictly charged and admonished that he do not at any time reveal and make known to any person whatsoever, any crime or offence so committed to his trust and secrecy, (except they be such crimes as, by the

(*e*) R. & M. Cr. Ca. 194. See 3 C. & P. 519.

laws of the realm, his own life may be called in question for concealing the same,) under pain of irregularity (*f*). With the Church of England, therefore, it is made a simple matter of discipline, the breach of which is merely censurable as for irregularity, and the obligation of which ceases to bind whenever the gravity of the matter confessed has reached the prescribed degree. But with the Church of Rome it is not a question of degree, but of principle; not of ecclesiastical discipline, but of the divine law. However, and notwithstanding the decision in *Gilham's* case, where the circumstances may have been considered unusually strong, the opinions of the judges are far from being uniform in favour of admitting in evidence even confessions made to a protestant clergyman. In *Rex v. Radford* (*g*), which was tried before a contrary decision was given by the twelve judges in *Gilham's* case, a clergyman having prevailed on the prisoner to confess by means of religious arguments, Lord Chief Justice Best expressed a strong opinion as to the impropriety of his being allowed to violate the confidence reposed in him, and his evidence was not pressed. Subsequently to the decision in *Gilham's* case, the same learned judge intimated that he should be bound to receive such confessions if a clergyman chose to disclose them; considering the point as established by the authority of that case. But his lordship added, that he, for one, would never compel a clergyman to disclose them (*h*).

A case very loosely reported (*i*) was tried before Mr. J. Buller on the Northern Circuit, in which a question of a confession made by a Roman Catholic to his priest seems to have been raised. In the report, indeed, it is stated to have been made by the prisoner, "a papist, before a *protestant* clergyman;" but from the context, as well as from the way the case has been cited in other

(*f*) 2 Burn's Eccles. Law, p. 9. 519.

(*g*) R. & M. Cr. Ca. 197, 202.

(*i*) *Rex v. Sparkes*, noticed in

(*h*) *Broad v. Pitt*, 3 Car. & P. Peake, 78.

instances, it is probable that this is an error of the press. The learned judge received the evidence, and the prisoner was executed. But it will be seen that this confession was gratuitous, and “made *before* the clergyman, not *to* him;” and it is therefore clear that it was no auricular confession, nor made with any view to such. And still, in the principal case, Lord Kenyon remarked, that he “should have paused before he admitted the evidence there admitted.” His lordship then endeavoured to distinguish it from the case then before him; observing that “the popish religion is now unknown to the law of this country.” But if the learned judge is correctly reported in this respect, it is certain that his observation was out of date. A reference to the date of the trial shows that it took place on the 27th of July, 1791, only a month and a few days after the 31 Geo. III. c. 32 had come in force. The popish religion was certainly then known to the law of England, and the ministers of that religion had as certainly obtained at last a legal consideration and capacity. At all events, the more recent enactment of the 10 Geo. IV. c. 7, in its combination with the 31 Geo. III. c. 32, has most materially affected the whole scheme of the constitution in its bearing to the Roman Catholics, and it is under that act that this question, if it again arises, will have to be decided.

It may be here mentioned, that, notwithstanding the Irish case of *Butler v. Moore*, which has been already referred to, it is not now the Irish practice to press the question, where the witness objects to it on the ground of its having a relation to what he has been told in confession. Independently, therefore, of the objections which attach themselves to that case as having been decided under the penal laws, there seems every reason to suppose that it is now no longer of authority even in Ireland.

The general consequences of holding a priest to answer questions of this kind have been already noticed. But in certain cases even more serious ones will follow. Let

us suppose a case where knowledge and concealment are sufficient circumstances from which to argue guilt. Thus, let us suppose a priest to have heard in confession of the existence of a treasonable plot. He is bound by the seal of confession not to reveal it; it takes its course. Under these circumstances, if the seal of confession were in contemplation of law no protection against his being obliged to disclose what he knew under it in a court of justice, the concealment made him a principal in the treason, and liable to be indicted as such. On the other hand, if it should be considered that the seal of confession was a sufficient protection, it must be either upon the ground of professional confidence or public policy. In either view the priest would be entitled to the same protection, against being called upon in court to give evidence in respect of matters where the same excuse existed. If the priest would be entitled to his discharge in the one case, he clearly could not be compelled to answer in the other. But if he would be compelled to forego his claim of privilege, and to answer as a witness, it is impossible to contend that the same privilege should be effectual against his liability as a criminal. In *Garnet's* case (*k*), the chief point on which the indictment was grounded was the circumstance that certain conferences alleged to have taken place, either in or out of confession, between the prisoner and other parties, concerning treasons then meditated by the latter, were kept secret by the prisoner, so that the treasonable intentions of his confederates were suffered to take their course. The main facts were not denied by the prisoner, who was a jesuit priest; but he alleged upon his trial that he knew nothing whatever of the supposed plot before its execution, excepting what was told him in sacramental confession, or in order thereunto, by the guilty parties. It also appeared that the connection between the prisoner and those parties

(*k*) 2 Howell's St. Tr. 217.

in reference to their plot had been made known to the government only through the information obtained from those parties, as well by means of the rack as by expectation of pardon. But that his previous knowledge of the plot was thus limited is not very clear. It is certain that this point was disputed upon the trial, and that, too, with such tenacity as to warrant the inference that the whole question of his innocence or guilt was thought to turn upon that one circumstance. He was not told by the court which condemned him that the seal of confession should not protect him from the general obligation incumbent upon him as a subject; nor that, whether it were in confession or no, he was bound to have revealed to the king's government the traitorous designs of which he had been enabled to inform himself. On the contrary, it seems to have been conceded on all sides, except by the attorney general, that the defence was a substantial one in itself; and therefore it was endeavoured, on the part of the prosecution,—and successfully as the event proved,—to impeach by counter-evidence the allegations of fact on which the defence rested. Thus, when Garnet was asked by the Earl of Salisbury why he did not write to his superior at Rome, to procure from him a prohibition of the plot, he is reported to have answered that “he might not disclose it to any, because it was matter of secret confession.” The Earl of Northampton then endeavoured to get rid of that defence by showing that secret or sacramental confession had nothing to do with the case. “That matter of confession, which before he refused to confess,—he confessed it now to endanger his own life; and therefore his former answer was idle and frivolous” (*l*). So, too, the attorney-general himself is said to have made answer, that (*m*), “1st, Greenwell's

(*l*) 2 Howell's St. Tr. 242.

are only of value for the purpose

(*m*) The author is not answerable
for Sir Edward Coke's reasons. They

stated in the text.

was no sacramental confession, for that the confitent was not penitent: nay, himself hath clearly delivered under his hand that the powder-treason was told him, not as a fault, but by way of consultation and advice. 2ndly, Greenwell told it not of himself that he should do it, but of Fawkes, Percy, Catesby, Winter, and others; and therefore he ought to have discovered them, for that they were no confitents. 3rdly, He might and ought to have discovered the mischief for preservation of the state, though he had concealed the persons. 4thly, Catesby told it unto him *extra confessionem*, out of confession. Lastly, By the common law, however it were, (it being *crimen læsæ majestatis*), he ought to have disclosed it" (n). At a later period of the trial, Garnet again set up the same defence, that "he was bound to keep the secrets of confession, and to disclose nothing that he heard in sacramental confession." It was then argued by the Earl of Salisbury,—who seemed to admit the general truth of the position,—that the seal of secrecy bound him not, where the confitent did not evince a proper disposition of soul for the sacrament of penance. He showed that this would apply very strongly (if it were true) to *Greenwell's* case, for that after that person had been absolved by Garnet upon his promise to desist from further prosecuting the powder-plot, he nevertheless joined Catesby and Percy in arms, and solicited others to do the same. "Hereby," saith he, "it appears, that either Greenwell told you out of confession, and then there needs no secrecy; or, if it were in confession, he professed no penitency, and therefore you could not absolve him" (o). The subtilty of these fancied distinctions plainly shows the very great difficulty in which the defence set up by the prisoner had placed the court. Nor is it possible to say what the result of that trial would have been, had the strong circumstantial evidence against the prisoner been wanting, by which he ap-

(n) 2 Howell's St. Tr. 246.

(o) *Ibid.* 255.

peared to have been privy to the plot independently of his clerical duty as confessor.

The result of this very imperfect review of the cases that have come before the courts as to the privilege of clergymen, would seem to be this:—

1. Disclosures made to clergymen in general for the mere purpose of obtaining spiritual advice and comfort, are not so far privileged as that they are not admissible in evidence against the party who made them.

2. But the court will not in general compel the clergyman to repeat them, if he object to do so.

3. In the case of protestant clergymen, the above rules apply equally to auricular confessions.

4. Auricular confessions made to a Roman Catholic priest are at least privileged to this extent—that the court will in no case whatever compel the confessor to disclose them.

5. And, perhaps, upon a sound conception of the peculiar policy of the institution, and of what is due to public decency and morality, the court will even forbid the question to be put to the confessor against the consent of his penitent.

In a very recent instance the Ecclesiastical Court evinced its readiness to adapt its own rules of practice to the religious peculiarities of Roman Catholics. In a cause which was depending before the Prerogative Court, it became necessary to examine a witness who was a professed nun of the Benedictine rule, and an official in the convent of that order at Hammersmith. Being bound by cloister-vows, she could not conscientiously leave the convent, and therefore her examination could not be taken in the usual manner. For this reason the registrar of the court was applied to, with the view of having her examination taken in the convent, but that officer objected to act on the proposal, unless the court should first sanction it. An application was now made to the court by Addams, stating the circumstances, and asking to have the witness's examination taken in her convent. Sir Herbert Jenner Fust

thought that this was not a case for requiring the witness to act contrary to her vow of seclusion. If an affidavit were put in, embodying the above facts, as stated by the learned advocate, the court would grant the order for taking the examination of the witness in her convent (*p*).

(*p*) *Dawes v. The Baron de Feuchères*, Prerogative Court, Thursday,

10th March, 1842; before Sir H. Jenner Fust, MS. Case.

CHAPTER VII.

CONSEQUENCES OF THE RELIEF ACTS.

THE important measures known by the general name of Relief Acts have been already noticed. There remain others, which, though at first sight they seem to have a very secondary importance, are, in their direct as well as indirect consequences, not to be ranked among the least valuable of the enactments passed in favour of Roman Catholics. It is true that many of them confer no especial relief upon them,—for the Dissenters participate in the same advantages,—and that in general no specific mention is made of any one class of non-conformists. But with non-conformists, as such, this treatise does not profess to concern itself; and whenever it happens upon enactments of so general an operation, it will only consider them so far as they are capable of an application to Roman Catholics. In the present chapter it is proposed to enumerate such statutory provisions of this kind as cannot, from their miscellaneous character, be classified under any other heads. Of these the rights enjoyed at law by a Roman Catholic clergyman, more especially in reference to the celebration of marriages, the visitation of paupers and prisoners, and their personal immunities, will particularly be noticed. Other matters will be reserved for a later period of the work.

Marriages.

By the 18th section of the 6 & 7 Will. IV. c. 85, as explained by the 35th section of the 7 Will. IV. & 1 Vict. c. 22, any proprietor or trustee of a building, whether under the same roof with any other building or

detached from it, provided it have been licensed and used, for one year next before registration, for public Roman Catholic worship exclusively, may obtain from the superintendent registrar of the district the registration of such building for the purpose of solemnizing marriages. But it is required, that on making his application to that effect, he must deliver to the superintendent a certificate, signed in duplicate by at least twenty householders, and countersigned by the proprietor or trustee, that such building has been used by them, during the above period, as their usual place of public religious worship, and that they are desirous of having it registered. The 19th section of the first-named act provides for the cancelling of the registry of a disused chapel, and the registration of another such building in its place, even although the latter may not have been used for one year next preceding.

Marriages may be celebrated in chapels so registered, either by certificate or by license. Both the former,—which has superseded the ancient form of marriage-banns,—and the latter,—which has superseded that of special license grantable by ecclesiastical authority,—are obtained alike from the superintendent registrar. In order to obtain the certificate or license, one of the parties, (where both are resident in the same district,) must give a notice to the superintendent registrar in the form specified in schedule A. to the 6 & 7 Will. IV. c. 85 annexed, or to the like effect, (s. 4). This notice must give the names and descriptions of the contracting parties, their ages, length of residence, &c., and must be signed by the party giving it. It cannot be given until the party shall have dwelt in that district for seven days then next preceding. Where the parties live in different districts, the like notice is to be given by each of them to the superintendent registrar of his and her district, with the further specification therein of the district and county of the other party's residence. Any false statement, knowingly made in any such notice, is punishable

as perjury, (s. 38). If there is no registered place of worship within the district of either party's residence, wherein marriages are solemnized according to the Roman Catholic faith, it is competent for either of them, under the 3 & 4 Vict. c. 72, to indorse upon the ordinary notice to the superintendent registrar, an additional notice in the form or to the effect of the schedule to that act. It must state that the party who subscribes it is a Roman Catholic, and that both parties desire to adopt the form, rite, or ceremony of the Roman Catholic Church in solemnizing their marriage; that to the best of the subscriber's knowledge or belief there is not within the district in question any registered building in which marriage is so solemnized; the name of the nearest district in which there is such a registered building; and that the parties intend to solemnize their marriage in the registered building, describing it by its name of registry, (ss. 2, 3). A false declaration, knowingly and wilfully made for the purpose of procuring a marriage out of the district where the parties, or one of them, dwell, is punishable as perjury, if the prosecution take place within eighteen calendar months from the solemnization of the marriage, (s. 4). As to the time of marriage, issue of certificate or license, and, indeed, all other matters not within this act, the parties must conform themselves to the provisions of the 6 & 7 Will. IV. c. 85, and the 7 Will. IV. & 1 Vict. c. 22. When the marriage is to be celebrated by certificate alone, twenty-one days' notice is required; and seven days' notice, when it is to be celebrated by license. (6 & 7 Will. IV. c. 85, ss. 6, 14.) In the first case a fee of 1s. only is payable to the superintendent registrar, and in the latter case a fee of 3l., besides the same stamp duties as are imposed on marriage licenses by the ordinary, (ss. 7, 12). In either case the district superintendent registrar, if he be clerk of the guardians of any Poor Law union, parish or place, comprising his district, is to read all such notices at the next weekly meeting of the union immediately after the reading of the minutes of the last

meeting; or, if he be not such clerk, he is to transmit them to such clerk on the day before such next weekly meeting, in order to their being read. In the case of marriage by certificate there must be (if possible) three weekly readings; in that of license, one is sufficient, (s. 6). If there are no such guardians, then,—but only until a board of guardians and a clerk of their board is elected,—every such notice, or a true copy thereof, under the superintendent registrar's hand, shall be conspicuously suspended in his office during seven successive days, if the marriage is to be by license; and during twenty-one successive days, if by certificate. (7 Will. IV. & 1 Vict. c. 22, s. 24.) It is competent to any person to inspect, without fee, the marriage-notice-book, kept by the superintendent registrar, (6 & 7 Will. IV. c. 85, s. 5,) and, if his or her consent is required by law, to forbid the issue of the certificate, whether it be the certificate whereon the marriage is to take place, or that on which the license is to issue, (s. 10). But there is this difference in the way of doing it. In the first case the party authorized must, at any time before the issue, write "Forbidden" opposite to the entry in the marriage-notice-book, and subscribe thereto his or her name, and place of abode, and character in respect of either contracting party (s. 9), subject, however, to prosecution as for perjury, should such statement be wilfully false, (s. 38). In the case of marriage by license, *any person*, on payment of 5s., may enter a caveat with the superintendent registrar against the grant of the license or certificate. It must contain the ground of objection, and be signed by the party who enters it, together with his name and place of abode, (s. 13). But section 37 of the same act empowers the registrar general to declare such grounds to be frivolous, and renders the party entering the caveat liable to the costs of the proceedings, and also to an action on the case at the suit of the aggrieved party, in which action, by the 7 Will. IV. & 1 Vict. c. 22, s. 6, a copy of the declaration of the registrar general, under the seal of the

general registry office, is made evidence of his having declared the grounds of the caveat to have been frivolous. It is remarkable that, while the notice and all proceedings thereupon are, by the 9th section, declared to be utterly void, in cases where the issue of the certificate shall have been forbidden, and the issuing any such certificate, by the 40th section, is also made a felony, the act is silent as to the effect of a marriage irregularly celebrated by license issued after the lodging of a caveat. And it is clear that the want of consent cannot be set up against the marriage after it has once been celebrated; it being expressly enacted by section 25, that it shall not be necessary to prove such consent in support of it; neither shall any evidence be given to prove the contrary in a suit touching the validity of the marriage. But it is provided by the 38th section, that any person knowingly and wilfully signing *any false certificate*, for the purpose of procuring any marriage, shall suffer the penalties of perjury.

In order to obtain the license, the first step after giving the requisite notice,—with the indorsed notice in addition, where that is necessary, (*ante*, p. 88,)—is for one of the contracting parties to appear personally before the superintendent registrar, and, if he be a new or different one, to deliver to him the certificate issued by the other superintendent registrar to whom the notice was given. Then the party appearing, except in the above case, must make oath or solemn affirmation or declaration that “he or she believeth that there is not any impediment of kindred or alliance or other lawful hindrance to the said marriage, and that one of the said parties hath, for the space of fifteen days immediately before the day of the grant of such license, had his or her usual place of abode within the district within which such marriage is to be solemnized [and,” (if either party be a minor not previously married,) “that the consent of the person or persons whose consent to such marriage is required by law, has been obtained thereto,” or, “that there is no person having authority to give such consent, as the case may be”].

The form of the license thereupon issued by the superintendent registrar is prescribed to be according to schedule C. in the appendix to the act. (ss. 8, 11, 12.)

The marriage must take place within three months after entry of notice, whether it be by license or by certificate alone. Otherwise it is provided, by s. 15, that the notice, certificate, license, and all other proceedings shall be utterly void. It must also take place within the hour of eight in the morning and noonday, with open doors, and in the presence of some registrar of the district appointed by the superintendent, and of two or more witnesses. The parties may, if they choose, after due notice and certificate, solemnize their marriage in the registrar's office, and not in a registered chapel. In that case the presence of the superintendent is required in addition to the registrar and the two witnesses. In any case each of the parties must declare, "I do solemnly declare that I know not of any lawful impediment why I, *A. B.*, may not be joined in matrimony to *C. D.*." And also each must say to the other, "I call upon these persons here present to witness that I, *A. B.*, do take thee, *C. D.*, to be my lawful wife, [or husband]." This is to be the whole ceremonial of marriage in the registrar's office; but if it take place in a registered chapel, so that these declarations be made at some part of the ceremony, it may be in other respects "according to such form and ceremony as the parties may see fit to adopt." The registrar's fee is five shillings for a marriage by certificate, and ten shillings for a marriage by license. He shall forthwith register the marriage in the book of births, deaths, and marriages. Each entry must be signed by him, and by the married parties, and attested by two witnesses: if there be any person by or before whom the marriage was solemnized, it must be also signed by him. The registrar is empowered to question the parties as to the particulars required to be registered; and any false declaration knowingly made, is made punishable as perjury. (ss. 17, 20, 21, 22, 23, 36, 38.) If the falsification

of notice, certificate, or declaration, be not such as to invalidate the marriage, the crown law officers may, by s. 43, sue for a forfeiture of all estate and interest in property accruing to the offender by such marriage. But the Court of Queen's Bench has no power to order the erasure or correction of an incorrect entry, registered in consequence of a false statement wilfully and fraudulently made under this act (*q*).

The 39th section of this act makes it felony so to solemnize any marriage in England, (except between Jews or Quakers,) otherwise than in an Anglican church or chapel, unless by special license, or than in a registered building, or a registrar's office under that act; 2nd, to solemnize a marriage in any such registered building in the absence of a registrar; 3rd, to solemnize a marriage before the proper time of notice has expired, or more than three calendar months after the entry of the notice. The first class of felonies is likely to have a serious operation among Roman Catholic clergymen attending the sick. It is not unfrequently that they feel themselves called upon to urge penitents, in certain cases, to make reparation on their deathbeds by marriage. Such marriages, of course, have been never considered valid, except *in foro conscientiae*, and as binding the parties, when convalescent, to complete them by a recourse to the formalities required at law. But, by this section, all illegal celebrations of marriage being made felonies, without any reservation in favour of such peculiar cases, it may often happen that the Roman Catholic ecclesiastic will find himself seriously compromised between his conscientious sense of duty and his inclination to obey the temporal law.

Births and Deaths.

Births.—The 6 & 7 Will. IV. c. 86, enacts, that the parents of every child born, or the occupier of every

(*q*) *Ex parte Stamford*, 9 Dowl. P. C. 927; 1 Gale & D. 428.

house or tenement in which a birth shall happen, may give notice of it to the district registrar, within forty-two days next after the birth. The masters or keepers of gaols, prisons, houses of correction, hospitals, lunatic asylums, or public or charitable institutions, are, for the purposes of the act, to be deemed occupiers of those establishments, (s. 19). The 20th section directs that, within the same time, the parents, or in case of their death, illness, absence, or inability, the said occupier, shall give information to the registrar according to knowledge and belief of the day of birth, the child's name, if any, its sex, its father's name and rank, its mother's maiden name, and the description and residence of the informant:—who shall subscribe his or her signature to the register of such statement, (s. 28). By the 7 Will. IV. & 1 Vict. c. 22, s. 8, the registrar general may also direct the place of birth to be added to the entry. If the time specified have elapsed, no such registry can be made, under a penalty of 50*l.*, but the father or guardian of the child, or some person present at its birth, must, in that case, make a solemn declaration of the above particulars, according to knowledge and belief, before the superintendent registrar. The registrar, in the presence of the superintendent registrar, may then register the birth, if the child be less than six months old: if not, no registrar shall register its birth under a penalty of 50*l.* (6 & 7 Will. IV. c. 86, ss. 22, 23.) The 41st section declares all wilful false statements of particulars “*required to be known and registered,*” made for the purpose of being inserted in a register, punishable as perjury. If within six months after registry a baptismal name is given to the child, the parent or guardian, or person procuring the name to be given, may, immediately after baptism, procure from the minister baptizing the child, upon demand and payment of one shilling, the following certificate, signed by such minister:—

" I, *A. B.*, Roman Catholic minister of —, in the county of —, do hereby certify that I have this day baptized by the name of —, a male [or female] child produced to me by *C. D.* as the son of *C. D.* and *E. D.*, and declared by the said *C. D.* to have been born at —, in the county of —, on the — day of —, 1842. Witness my hand, this — day of —, 1842.

" *A. B.*, Roman Catholic minister."

The party procuring this certificate may, within seven days after the baptism, deliver it to the registrar or superintendent registrar, in whose custody the register is kept, who, upon receiving one shilling, shall, without making any erasure in the original register, enter therein the fact of the child's being baptized by such a name, certify upon the certificate the fact of the additional entry, and transmit the certificate forthwith to the registrar general, (s. 24). And the penalty of 50*l.* is imposed by the 42nd section on any omission or refusal on the part of registrars to register any birth of which due notice has been given. No provision, however, being made for an omission or refusal to register a baptism, it is apprehended that the proper proceeding in such a case will be by indictment as for a simple misdemeanour.

Deaths.—By the 6 & 7 Will. IV. c. 86, ss. 25, 28, and the 7 Will. IV. & 1 Vict. c. 22, s. 58, it is directed that some person present at the death, or in attendance during the last illness, or in case of their death, illness, inability, or default, the occupier of the house where the death took place, or some inmate, if the occupier be the deceased person, shall within eight days next after such death, upon being so requested, give information to the registrar, according to knowledge and belief, touching the day of death, (and if so directed by the registrar general, the place of death,) the name, sex, age, and profession of deceased, the cause of death, and the description and residence of informant, who shall subscribe his name at the foot of the register. But if there be an inquest over the dead body, the jury shall inquire and find the above particulars, "and the coroner shall inform the registrar of the finding of the jury," to be entered accordingly.

But the 19th section of the first act empowers every occupier of a house, where a death shall happen, to give notice of such death to the district registrar within five days after the event; and we have already seen that for the purposes of the act every master or keeper of a gaol, prison, house of correction, workhouse, hospital, lunatic asylum, or public or charitable institution, shall be deemed the occupier thereof. The same section also directed, in case of a dead body being "found exposed," that the coroner shall "forthwith" give notice and information thereof, and of the place where found, to the registrar. If an incorrect entry have been registered in consequence of a false statement wilfully and fraudulently made for that purpose, the Court of Queen's Bench has no power to correct or erase it (*r*). But such false statements touching any particulars required to be known and registered, if done for the purpose of being inserted in the register of births, deaths, or marriages, are made punishable as perjury, (s. 41). The penalty for refusing or omitting to register marriages, births, or deaths, under the act, without reasonable cause, is the forfeiture of 50*l.* for each offence, (s. 42). Immediately upon registering such death, or as soon afterwards as he shall be so required, the registrar shall, without fee or reward, deliver to the undertaker, or person having charge of the funeral, a certificate of the death's being registered, which shall be delivered by such undertaker or other person to the minister or person officiating at the burial. If no such certificate is delivered to the latter, he must, within seven days after the burial, give notice to the registrar, unless there have been an inquest, and the burial have been so directed by the coroner. The penalty is 10*l.* for every case of non-compliance, (s. 27).

All the above penalties, unless otherwise directed, may be recovered by information or complaint in a summary

(*r*) *Ex parte Stamford*, 1 Gale & D. 428; 9 Dowl. P. C. 927.

manner before two county or borough justices, who are empowered, in default of payment, to levy the same by distress warrant under their hands and seals, or to commit for one month, without bail or mainprise; where there is no distress, one moiety of the penalty is to go to the informer, and the other to the registrar general, or other appointee of the treasury, for the use of her majesty. An appeal from such conviction is given to the sessions, but *certiorari* is taken away. (6 & 7 Will. IV. c. 86, ss. 45, 46, 47, and 7 Will. IV. & 1 Vict. c. 22, s. 4.)

Roman Catholic Registers.

It will be observed that the above acts do not contain any provision for legalizing the old registers of marriages, baptisms, and burials, celebrated in Roman Catholic places of worship. Henceforward, too, the birth and death, and not the baptism nor the burial, will have to be registered in conformity with these acts. Nevertheless, in certain cases the old registers are capable of being authenticated under the late act, 3 & 4 Vict. c. 92, for the purpose of being received in evidence. And whether they be so authenticated or not, so that they be otherwise unobjectionable, the original registers themselves may be made evidence to a limited extent, according to the doctrine laid down in cases that have come before the courts. That is to say, they may be received, not as registers, but as declarations made under the hand of the party, or as circumstantial evidence as to facts asserted or denied by independent testimony. But, not being in the eye of the law considered as registers, nor public documents, coming from official custody, extracts from or copies of these books are of no more weight than mere private memoranda, and if tendered in evidence in a court of justice, such extracts or copies would be certainly rejected. Thus, where (s), to prove that a legatee had attained his age of

(s) *Ex parte Taylor*, 1 Jac. & W. 483.

twenty-one, an examined copy was produced of an entry in the famous register of births, kept in the dissenting library in Redcross Street, the Master of the Rolls refused to act upon such evidence. But in *Lloyd v. Passingham* (*t*), where the question was the admissibility of the Fleet registers,—to which so much odium is attached that they have never been received as registers, and at this day have been even rejected as memoranda or declarations (*u*),—Lord Eldon said, “The evidence produced at the trial was of three sorts: 1st. The Fleet books, alleged to have been kept so regularly, that they might be admitted in evidence; and they were admitted: *the original books being produced; not copies.* . . . I give no opinion that the Fleet register is evidence *as a register*. But I am not prepared to say, it may not be received as evidence of a fact; and I can suppose cases in which such evidence might be received. Upon a question of pedigree, would not that entry be admitted, not as a register, but a declaration under the hand of the party? Or, upon an indictment for bigamy,—the first marriage *alleged to have been in the Fleet, and evidence produced, that uniformly an entry of marriage was made*,—would not the production or non-existence of such entry be evidence to the other fact?” The distinction between the admissibility of non-parochial registers, and that of copies or extracts from such, was taken by Sir J. Nicholl in the case of *Newham v. Raithby* (*x*); and it would also seem from the language of the court on that occasion, that the Prerogative Court will not admit even the original registers to a greater amount of credit than they are possessed of in the courts of law and equity. In that case an objection was taken to an article in the allegation which pleaded a *copy* of a dissenting register. The judge refused to admit the evidence. “The court can only admit *copies* of public documents which are in official custody. Extracts from a

(*t*) 16 Ves. 62.

8 Carr. & P. 578.

(*u*) *Doe dem. Davies v. Gatacre*,(*x*) 1 Phill. 315.

register of this description must be considered as mere private memoranda. The books themselves, however, may be produced at the hearing of the cause, and be made evidence to a certain extent; by this means the party will have the benefit of them, though in a different manner from that in which they have been now attempted to be introduced."

A commission under the great seal was appointed on the 13th of September, 1836, for inquiring into the state, custody and authenticity of non-parochial registers of births or baptisms, deaths or burials, and marriages "lawfully solemnised" in England and Wales, and the copies of such deposited with the diocesan registrars, and for inquiring into the best mode of authenticating the same as evidence. By a second commission under the great seal, issued in the first year of the present reign, the powers of the commissioners were further continued. The preamble to the 3 & 4 Vict. c. 92, after reciting these facts and the Report of the commissioners, dated the 18th of June, 1838, by which it appeared that there were then about 7000 registers in their custody, and recommended by them to be made receivable in evidence subject to conditions, enacts that all such registers, and others mentioned in the said Report, and such other registers as are mentioned by that act, shall be received and deposited by the registrar general in the general register office. The commissioners were continued in their powers and duties for twelve months, and were authorized to certify to the register office, under the hands and seals of any three of them, the accuracy and fidelity of every register or record of "birth, baptism, naming, dedication, death, burial, and marriage," which should have been sent to them on or before the 10th of November, 1840. Upon receiving such certificate, with a secretary of state's order, the registrar general was directed to receive and deposit such registers and records with those mentioned in the preamble, (s. 2). By the 4th section it is pro-

vided, that in the descriptive lists to be from time to time delivered by the commissioners to the registrar general, the parts, if any, of such records or registers which do not appear to them to be original or authentic shall be specifically distinguished from such as do so appear, so as to identify them to the satisfaction of the registrar general. Lists are also directed to be made by the registrar general, and they are to be open to search, (s. 5). The registrar general is bound to produce upon subpoena or order any of the registers or records so deposited, and by that act made receivable in evidence, as coming out of legal custody, (s. 6). The originals are made evidence both at common law and sessions, (except in criminal cases,) and also in equity, upon giving the other party reasonable notice, in the former case, and ten clear days' notice before passing publication, in the latter case, of his intention to use such record or register, together with a copy of the certified extract which he intends to use in evidence. Or he may, upon the like notice, obtain an extract at the register office of the passage he intends to use, which, when stamped and verified in the manner pointed out by ss. 9 and 10, shall be received as evidence, and a copy of such certified extract shall accompany the notice to the other party. (ss. 11 to 15.) In the ecclesiastical and admiralty courts certified extracts are to be used, but the judge, on cause shown, or, in penal cases, on his own motion, may, after publication, issue a monition for production of the original, (s. 16). In criminal cases, however, the originals must be produced, (s. 17). By the 18th and 19th sections, the Lord Chancellor and Master of the Rolls, the chiefs and five judges of the courts of Queen's Bench, Common Pleas and Exchequer, the Admiralty judge, and the official principal of the Arches Court, with the chancellor of London or commissary of Canterbury, are, during three years from the passing of the act, empowered to make rules as to the mode of reception of such records and

registers in evidence, the manner of notice, and the practice of costs, for the Court of Chancery, the three common law courts, the Admiralty Court, and the ecclesiastical courts respectively. These rules shall take effect within six weeks after they have been laid before parliament.

It is necessary to mention that the 2nd section of this act seems to apply to no other marriages than such as were "lawfully solemnized" in England or Wales, no others being within the meaning of the commission. The effect is, that its operation is restrained to the giving authenticity to registers of two distinct classes of marriages. 1st. Such as were solemnized before the passing of the Marriage Act (*y*), which first made it illegal to be married elsewhere than in the Established Church. 2nd. Such as have been lawfully solemnized since the passing of that act, but no registers of which were made, or, having been made, are lost. But no such restriction has been made as to the other matters specified in the 2nd section. Any register therefore which has been authenticated under the 3 & 4 Vict. c. 92, may be received as evidence in any one of the courts of this realm, to prove a "birth, baptism, naming, dedication, death, or burial," whether the canons or ordinances of the Established Church have been observed or not, in respect of such particulars.

Workhouses.

None of the English Poor Law Acts contain any provision for the celebration of worship by the Roman Catholic inmates of these establishments. In this respect they differ materially from the Irish act, 1 & 2 Vict. c. 56. But there is a general clause in the "Act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales" (*z*), which

(*y*) 26 Geo. II. c. 33.

(*z*) 4 & 5 Will. IV. c. 86, s. 19.

obviates a portion of the difficulty. By that clause, no rules, orders, or regulations of the Poor Law Commissioners, nor any by-laws then in force or thereafter to be made, shall oblige any inmate of a workhouse to attend religious service celebrated in a mode contrary to his or her religious principles. Nor shall such rules, &c. or by-laws, authorise the education of any child in such workhouse in any other religious creed than that professed by its parents *or surviving parent*, if such parents or parent shall object to it,—or, in the case of an orphan, if its godfather *or* godmother shall so object. And any licensed minister of the religious persuasion of any inmate of such workhouse may, at all times in the day, on the request of such inmate, visit the workhouse “for the purpose of affording religious assistance to such inmate, and also for the purpose of instructing his child or children in the principles of their religion.” The “licensed minister,” in the case of a Roman Catholic, it is apprehended, must be a priest duly certified to the sessions in the manner required by the 31 Geo. III. c. 32. From the very loose and inaccurate wording of this clause, it would seem doubtful whether the minister can insist upon his right to visit the workhouse, unless he come as well for the purpose of instructing the child as for that of affording religious assistance to the parent. And it is certain, that neither the godfather nor the godmother of an orphan pauper have any authority, under this section, to apply to a minister of their persuasion to visit the workhouse and instruct it.

Prisoners.

There is no enactment which empowers Roman Catholic ecclesiastics to visit prisoners of their communion. Neither is the admission of religious books into prisons for the use of their Roman Catholic inmates provided for. But by the 5 & 6 Will. IV. c. 38, it is competent for the local justices to make rules and regulations

touching the government of prisons in England and Wales, and the duties of their officers, and to submit the same to a secretary of state, for his approval or amendment. Such rules and regulations, when they have been certified by him, are to be binding upon the sheriff and all other persons, without any other sanction or approval. And, by the act for the better ordering of prisons, (2 & 3 Vict. c. 56,) it is especially enacted (s. 6), in addition to and amendment of all other prison rules and regulations, that no books or printed papers shall be admitted into any prison for the use of prisoners not belonging to the Established Church, but such as shall be chosen by the visiting justices. The keeper of the prison is to keep a catalogue of all books and printed papers admitted into it. The 15th and 16th sections, which direct the appointment of chaplains, relate only to clergymen of the Established Church ; and there is no clause exempting prisoners, not of that church, from attending the gaol service.

Infant Felons.

The 3 & 4 Vict. c. 90, was passed for the improvement and education of infants under twenty-one, convicted of felony. Subject to the due execution of the sentence against any infant convict (s. 4), it is enacted, by s. 1, that the Court of Chancery may, on the application of a person willing to take charge of such convict, and provide for his or her maintenance and education, assign the care and custody of the infant, during the whole or part of his or her minority, to the applicant, upon such terms and conditions as to maintenance, education, and care, as the said court may direct. The court shall award costs against the applicant, if the application appear to be ill-founded ; and it may at any time rescind the assignment, or the terms and conditions thereof, or alter them at its discretion. But no such order of assignment can be made unless it will be for the benefit of the infant, due regard being had to its age, and the " circumstances,

habits, and character" of its parents or guardian. If made, the order shall be binding upon the father and guardian; and no person shall use or exercise any power or control over such infant which may be inconsistent with such order. It is remarkable, that among the other reservations, none should be made of the religious principles of the infant or his parents. Probably, however, the court will hold itself bound to take these into its consideration, from the circumstance of the infant's benefit having been expressly provided for by the act; and from the direction it contains, to have a due regard to the *circumstances* and *habits*, no less than to the *character* of its parents. The true interpretation of these words would be quite large enough to comprehend qualifications, not only of a moral, but also of a religious nature.

Churches and Chapels.

The 52 Geo. III. c. 155, s. 12, appears to have superseded the provisions of the 31 Geo. III. c. 32, s. 10, for the protection of Roman Catholic worship. By the first mentioned act, any person wilfully and maliciously or contemptuously disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship permitted by that act, *or any former act or acts*, or disturbing, molesting or misusing any person there officiating, or there assembled, shall forfeit, on conviction at the sessions, 40*l*. The provisions of the 31 Geo. III. c. 32 are less general, being confined to Roman Catholic congregations and their ministers. The penalty is only 20*l*. However, if the provisions of the Relief Act have been complied with, there seems nothing to prevent the offender from being indicted under either statute.

Church and Poor's Rates.

Under the 2 & 3 Will. IV. c. 30, all Roman Catholic

churches or chapels, exclusively appropriated to public religious worship, and certified to the sessions agreeably to law, are exempted from the payment of church or poor rates, or cesses, even although the premises or part of them are also used for Sunday or infant schools, or the charitable education of the poor. A like exemption is made in favour of the portion exclusively appropriated to such worship, where other portion of the premises is not so exclusively appropriated, *and* from which any person shall receive rent, profit, or advantage.

Assessed Taxes.

Hospitals, charity schools, almshouses, and "licensed" chapels are exempted from the window duties. The room used as a chapel must be exclusively so used. But the apartments, if any, occupied by officers or servants belonging to the hospital, school, almshouse, or, as it is apprehended, the chapel, are not exempted. (48 Geo. III. c. 55, sch. A.)

By the 4 & 5 Will. IV. c. 73, s. 4, the additional duty of 1*l.* a head for every male servant, imposed by the 48 Geo. III. c. 55, and the 52 Geo. III. c. 93, upon male persons never having been married, is repealed in favour of priests of the Roman Catholic faith who shall have duly taken the oaths and declarations required at law, upon the terms of his making the return and claiming his exemption in manner required by the act. By the 5th section, any such priest is exempted from the assessed taxes, for one horse, mare, gelding, or mule, kept for the saddle, or for drawing any untaxable carriage, unless his income shall amount to 120*l.* per annum or more, *and* unless he shall keep more than one horse, mare, gelding, or mule, which would be otherwise chargeable with duty. He must claim his exemption in the manner specified by the act. To entitle a priest to the benefit conferred by the act, it is not necessary that he should have been certified to the sessions, but only that he

should have taken and subscribed the Catholic oath. Other immunities will be shortly noticed in the last division of this chapter. They relate to offices, and savour very much of disqualifications.

Elective Franchise under Charitable Foundations.

Although this subject bears a very close relation to some matters discussed in succeeding chapters, it may not unsuitably be treated in this place. The only legislative provision upon this very doubtful question is contained in the 4 & 5 Vict. c. 38. By the 17th section, no schoolmaster or schoolmistress to be appointed to a school built on land conveyed under the powers of that act, shall be deemed to have acquired a like interest by virtue of such appointment; but, unless otherwise specified, his office shall be held at the discretion of the trustees of the school. It is clear, therefore, that as to such persons, the right of voting as freeholders does not exist, in default of a specific engagement that they shall hold their offices for life. But it is by no means so clear as to other schoolmasters, in respect of their schools, or as to priests, in respect of their official residences. It has been asserted, that in this country Roman Catholic missionaries hold their appointments to missions as they received them,—at the will of the bishop. In this view of the case they certainly have not a freehold, but only a chattel interest, in the buildings and lands attached to their missions, which they occupy as such appointees. But this point has been contested by others, who assert that after appointment they hold their offices during good behaviour, that is, for life. It is even true that a merely general appointment may, under certain circumstances, as, for example, a custom to that effect, warrant the presumption that it was for life. But such a presumption is impossible where the appointee holds his office at the will of the party to

whom he owes it (*a*). The whole question here turns upon the laws of the Roman Catholic Church in England. If it be indeed true that a mission priest has, by appointment to a mission, the character of parish priest, or *quasi-parochus*, as some have termed it,—in other words, if his right to occupy the mission property be not dependent on the mere pleasure of the bishop or party appointing him,—there is no doubt that he will be presumed to have a life interest in it, and if the value be sufficient for the purpose, it will entitle him to vote at elections as a freeholder. But, so long as the fact is disputed, there is unfortunately no possibility of laying down any general rule upon this question. The practice,—which has been most justly disapproved of,—is to act upon the belief of each minister as to the nature of his qualification. If he affirm it to be an appointment for life, not removable at will, he will be admitted. If he affirm the contrary, or if he be unable to state what the appointment was, he will be rejected (*b*).

Parliamentary, Municipal, and Parochial Offices.

There is nothing to prevent Roman Catholic ecclesiastics from sitting in the House of Lords. But the 10 Geo. IV. c. 7, s. 9, has disqualified all such from sitting in the Lower House; thereby, in fact, placing them upon the same footing as clergymen belonging to the two Establishments. Dissenting ministers, as such, are not affected by this nor any other enactment; such ministers not having holy orders. The enactment is that no person in holy orders in the Church of Rome shall be capable of being elected; nor shall any person be capable of sitting, if, after having been elected, he shall take or receive holy orders in that church. In either case the

(*a*) *Rex v. Jotham*, 3 T. R. 575; *ibid.* 721.

Doe dem. Jones v. Jones, 10 B. & C. 718; *Doe dem. Nichols v. Mackay*,

(*b*) Chambers's Dict. of the Law of Elections, tit. *Dissenting Minister*.

seat is void; and the offence of sitting or voting as a member in such cases, is made punishable as under the 41 Geo. III. c. 63, which subjects persons ordained as priests or deacons, or being ministers of the Church of Scotland, to the penalty of 500*l.* with full costs for every day in which he shall so sit or vote, and to perpetual disability of holding any ecclesiastical benefice, living, or promotion, or any office of honor or profit under the crown. Proof of the celebration of any religious service by such person according to the Roman ritual, will be *primâ facie* evidence of his being in holy orders, within the 10 Geo. IV. c. 7, s. 9.

By the 5 & 6 Will. IV. c. 76, s. 28, Roman Catholic clergymen are also disqualified from being elected or being councillors or aldermen of boroughs within that act.

The 31 Geo. III. c. 32, s. 8, has exempted all Roman Catholic priests qualified under that act, and being ministers, teachers, or preachers of congregations, from serving on juries, or from being chosen or appointed to the offices of churchwarden, overseer of the poor, or any other parochial or ward office, or any other local office. It is doubtful whether the office of guardian, which was created since this act, can be said to be within the intention of it. If the effect of the first section of the 2 & 3 Will. IV. c. 115, has been to extend to Roman Catholics the provisions of the 52 Geo. III. c. 155, in favour of dissenters, Roman Catholic ecclesiastics, solely employed in teaching and preaching in congregations or assemblies, and producing a certificate of their having taken and subscribed the proper oaths, are exempted not only from the civil services and offices specified in the 1 Will. & Mary, sess. 1. c. 18, but also from being ballotted to serve in the militia.

CHAPTER VIII.

DISABILITIES OF ROMAN CATHOLICS IN RESPECT OF
THEIR CHARITABLE INSTITUTIONS.

So long as the Roman Catholic religion was proscribed by law, and its promulgation forbidden under any circumstances whatever within this realm, there could be no question as to the illegality of all foundations of a religious character, tending to the maintenance or practical illustration of the forbidden tenets. But when these prohibitions became relaxed by legislative interposition, and the profession of Roman Catholicism was no longer of itself a transgression of the laws of the realm, it seems strange that the courts should have imagined any restrictions upon their newly restored rights beyond such as were distinctly specified in the Relief Acts. Most Roman Catholics chose to accede to the terms offered them, and by taking the oaths required by the 10 Geo. IV. c. 7, showed that they were persons who, in the words of the preamble of an earlier Relief Act (c), were "willing to disclaim" the "principles dangerous to society and civil liberty" which had been erroneously "attributed to them." Such an act of conformity to the principles of the constitution was evidently demanded of them out of a regard to the numerous opinions and decisions upon this subject with which our text writers and reporters abound, and which, if they correctly represented the tenets of the Roman Catholic faith, would have made it impossible for any parliament to mitigate the existing laws against it. But the oath afforded a test. Once taken by a Roman Catholic, his religion could no

(c) 31 Geo. III. c. 32.

longer be viewed at law as “a conspiracy *against the state*, as well as religion” (*d*); nor could he himself be justly regarded as answering to that description which the learned writers of those days have given of papists. To use their words, papists were “our common enemy, . . . especially the jesuits and priests and other runagate English fugitives, who, against our policy and laws, are obliged by their oaths; and in their vows they blaspheme it. Their actions are not so much slanders or personal injuries as murthers; or rather treasons than murthers. As Sir Thomas Smith, the secretary, writes, God suffers these, like lice and vermin, in all ages, to disquiet some men that would be better employed. Their tongues, like the tails of Sampson’s foxes, carry fire-brands in them, setting on fire the course of nature. As St. James speaks, their tongues are set on fire by hell; and I have fancied, (in that, until the general doomsday, the damned spirits want their tongues,) that, in the meantime, they are rooted in the mouths of our English fugitive papists” (*e*). Their objects were pronounced to be to dissuade the people “from their allegiance to their prince, to reconcile them to the pope, to plant the Romish religion, to supplant both prince and province; by saying of mass, by administering the sacrament, by hearing confessions” (*f*). They were compared, by Lord Coke, to the leprous persons, who were liable to the writ *de leproso amovendo*, for fear of infecting the body; but so much the more dangerous than these, as they were said to infect the soul. And it was therefore declared to be better and far safer to have them to lie in prison than at large, and not to conform themselves (*g*).

While such was the manner in which the Roman Catholic faith was regarded by the oracles of English law, there

(*d*) *Thornby v. Fleetwood*, 10 Mod. 3, (pp. 81 to 86 of a copy *penès me*).
117.

(*e*) Sir Roger Owen’s Treatise on the Antiquity, &c. of the Common Law of England, Harl. MSS. chap. 3, (pp. 81 to 86 of a copy *penès me*).
St. Tr. 1053.

(*f*) *Campion’s case*, 1 Howell’s
(*g*) *Att. Gen. v. Griffith and others*, 2 Bulstr. 155.

is no doubt that it was quite unnecessary to invalidate their religious foundations by positive enactments. And, in fact, there was no statute making them void generally (*h*). But the common law doctrine was sufficiently general to render all such uses illegal, calculated, as they were, to promote a religion so branded by the legislature. As head of the commonwealth, the king is bound, and empowered, without any specific enactment to that end, to see that nothing be done to the propagation of a false religion (*i*). And even at this day, such Roman Catholics as decline or neglect to take the oath, conditioned by the Relief Acts, still continue to be obnoxious, not only to the penal enactments, which have been already noticed in the course of this treatise, but also to the presumption of entertaining, as religionists, those disloyal and anti-social doctrines which were made the basis, as well of the enactments themselves, as of the wide construction given them by the judges. Any endeavours, therefore, on the part of such non-jurors to propagate, or even to support, their religious tenets, would likewise continue to be illegal; and all gifts or legacies towards the accomplishment of such purposes, whether made by them or in favour of them, would be therefore void.

This interpretation of the effect of the first Relief Act, (31 Geo. III. c. 32,) appeared so obvious in the eyes of the legislature of that day, that, not designing to confer the constructive relief in question, it was found necessary to guard expressly against it. It was, therefore, provided by the 17th section, that nothing in that act contained should make it lawful for Roman Catholics to found, endow, or establish any school, academy, or college, within the realm or its actual dominions; although, as we have seen, they were not to be prevented from simply teaching or keeping schools. And it was further provided that, whatever uses, trusts, and dispositions of

(*h*) *Cary v. Abbot*, 7 Ves. 495.

(*i*) *Rex v. Lady Portington*, 1 Salk. 162.

real or personal property were theretofore "deemed superstitious or unlawful," should still continue to be so deemed, notwithstanding that act. Thus, down to the passing of the 10 Geo. IV. c. 7, Roman Catholic foundations of a religious or charitable nature remained subject to the ancient law of illegal uses, although the grounds and reasons of them had ceased. The effect was that their invalidity under that Relief Act remained the same as it had been under the penal acts. But this effect was produced by the 17th section alone, which reserved such foundations from the consequential operation of the general enactment. Now, as the 10 Geo. IV. c. 7 contains no such reservation or exception, it might have been not unreasonably expected that the courts would have construed it in regard of these foundations, just as the former act would doubtless have been construed had it not been for the insertion of the 17th section. Upon principle it seems clear that in the case supposed, the operation of that enactment would have protected foundations, as effectually as it protected worship, and that, as the latter was now as much protected under the act, as the worship of dissenters had ever been under previous Toleration Acts, so, also, by the equity of the act, the foundations of Roman Catholics were raised to the same level with those of dissenters, and were equally with them entitled to the protection of the law. And the effect of this construction would of necessity have been retrospective.

This, however, is not the view which the courts have thought it right to take of the true operation of the 10 Geo. IV. c. 7, in regard to the religious and charitable institutions of Roman Catholics. It has been considered that although that act imposed no such restriction upon the relief given by it to Roman Catholics, as that contained in the 31 Geo. III. c. 32, s. 17, yet that, in the absence of a formal repeal of that reservation it must still be accounted to subsist; and that the religion of the Roman Catholics is still an unlawful religion for all such purposes as are, in the eyes of Anglican Protestants, super-

stitious, although for other purposes, amongst which are the profession and propagation of its doctrines, it is no longer an unlawful one! And this has been the interpretation of the law in its regard, even since the passing of the 2 & 3 Will. IV. c. 115, by which the 17th section of the 31 Geo. III. c. 32 was virtually, although not literally, repealed, and the same protection afforded to the pious intentions of the founders and benefactors of Roman Catholic institutions of charity and religion, as were then enjoyed by the various bodies of dissenters. The anomalies introduced into the whole law of superstitious uses by these decisions, will best appear by a short statement of the cases to which they relate. But before doing so, it will be convenient to take some notice of the Roman Catholic Charities Act (*k*), under which those cases were professedly decided.

The preamble to that act recites the removal of dissenters' disabilities by the 1 Will. & Mary, c. 18, and various acts, ending with the 52 Geo. III. c. 155. It then recites a Scottish act imposing certain penalties upon Roman Catholics in Scotland, and that, notwithstanding the various Relief Acts, "doubts had been entertained" as to the competency of Roman Catholics there, "to acquire and hold in real estate the property necessary for religious worship, education, and charitable purposes." There is no positive recital that there were similar doubts as to Roman Catholics in England and Wales; however, the preamble goes on then to recite the expediency of removing "all doubts" respecting their right in the same regard. It is, therefore, enacted, that from the 15th of August, 1832, Roman Catholics in Great Britain shall be subject to the same laws "in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, *and the persons employed in or about the same,*" as dissenters are subject to in England "in respect to their schools and

(*k*) 2 & 3 Will. IV. c. 115.

places for religious worship, education, and charitable purposes," (s. 1). This general enactment is narrowed as to England and Wales by the 5th section. All property there "to be acquired or held for such purposes of religious worship, education, and charitable purposes," is, by that section, made subject to the Mortmain Act (*l*), and generally to all laws affecting English dissenters in respect of the acquiring or holding of such property.—Schoolmasters and other masters employed in such endowed schools or places, are required by the 2nd section to qualify themselves by taking the Roman Catholic oath in manner specified, as is presumed, by the 10 Geo. IV. c. 7, s. 6, in all cases where the oath of supremacy or declaration against transubstantiation would have been required as a legal qualification for such employments at the time of the passing of that act. We have already seen (p. 23), that it is very uncertain whether the vague language of this section may not yet receive a more extensive interpretation than is here given it.

The effect of this enactment, therefore, has been to remove all doubts, if any there were, or could be, as to the indirect operation of the 10 Geo. IV. c. 7, upon the religious and charitable foundations of a body of her majesty's subjects, whose religious principles it declared to be no more inconsistent with the constitution than those of the various sects of Protestants, not in communion with the Establishment. And the 2 & 3 Will. IV. c. 115 follows out the analogy, by expressly placing such foundations upon the same level in all respects with dissenters' foundations. There are, certainly, two reservations; but for our present purpose, they form the strongest commentary on the silence of the act as to any other. By the one, suits then actually pending, and property then in litigation, discussion, or dispute, in any court of law or equity, are not to be affected by the act (s. 3). By

(*l*) 9 Geo. II. c. 36.

the other, (s. 4,) the penal clauses of the 10 Geo. IV. c. 7, for suppressing jesuits and other religious, are still to be in force. The first of these provisoes probably guided Lord Brougham in his decision that, notwithstanding the prospective language employed in the first section, the act was retrospective too (*m*). It would naturally occur to that learned judge, that the reservation of litigated cases, implied that past cases, not in litigation, were within the act. In the same manner, the reservation of two solitary exceptions to the general authority thereby conferred on Roman Catholics,—to be pious and charitable according to their opinions, and to adopt their own course in promoting, by endowments, those opinions,—naturally implied that these were to be the only limitations to the equity of a statute passed for the professed purpose of removing doubts concerning the existing law, and of affording relief to oppressed consciences. *Expressio unius est exclusio alterius*. But if this be the true interpretation of the act, it is difficult to reconcile it with the decision in *West v. Shuttleworth* (*n*).

Margaret Townsend, by her will dated the 25th of January, 1814, disposed of the residue of her estates and effects to two trustees upon trusts declared in a letter addressed to them, which she inclosed in her will, and which was found in the will after her death. Those trusts were, “that the sum of 10*l.* each were to be given to the ministers of the Roman Catholic chapels at Greenwich, St. George’s in the Fields, Sutton Street Soho, and York; *for the benefit of their prayers for the repose of her soul, and that of her deceased husband George Townsend*; and that the remainder was to be appropriated by the trustees in such way as they might judge best calculated to promote *the knowledge of the Catholic Christian religion among the poor and ignorant inhabitants of Swale Dale, and Weston Dale, in the county of York.*” By her will

(*m*) *Bradshaw v. Tasker*, 2 M. & K. 221. (*n*) 2 M. & K. 684.

she appointed three other persons her executors. By another testamentary paper of the same date she bequeathed sums varying from 10*l.* to 5*l.* and 1*l.* 1*s.* to several priests and chapels, adding, that whatever she had so left, “it was her wish and desire might be paid as soon as possible, *that she might have the benefit of their prayers and masses.*” She died in February, 1815, when the will and the last-mentioned testamentary paper were proved by her executors. But the letter to the trustees was not proved until 1834, after the original hearing of the cause. The bill was filed under the Mortmain Act (o) by the residuary legatee and representative of the testatrix’s sole next of kin. It having been referred to the master to inquire how much of the personal estate consisted of pure personalty, not arising from mortgages or otherwise connected with realty, he found that 434*l.* 3*s.* 7*d.* 3 per cent. consols arose from pure personal estate. There were two questions for the court to decide: 1st, as to the specific bequests for masses and prayers; and 2ndly, as to the residuary bequest for the propagation of “the Catholic Christian religion” among the ignorant poor in Yorkshire. It was insisted that both of these classes of bequests were equally void, as contrary to the policy of the law,—the one being superstitious, and the other a gift for the purpose of propagating a religion other than that of the state; and the various cases which had come before the courts prior to the passing of the 10 Geo. IV. c. 7, were relied upon in support of the proposition. On the other hand, it was contended that the gifts to chapels and priests were in the nature of rewards for services to be performed immediately, and not in perpetuity, as was clearly inferable from the smallness of those sums, and the direction for their immediate payment. Not being contrary to the policy of the law, as amounting to a perpetuity, they were not against the policy of the law as gifts to superstitious purposes. There

(o) 9 Geo. II. c. 36.

was no statute making such uses void generally, as Sir William Grant had observed in *Cary v. Abbot* (*p*); the act of Edward VI. relating only to certain superstitious uses at that time existing. And neither those specific legacies, nor the residuary bequest for the promotion of the "Catholic Christian religion," (as the testatrix understood the terms,) could any longer be held void, as contrary to the general policy of the law, after the passing of the 10 Geo. IV. c. 7, and the 2 & 3 Will. IV. c. 115. By the latter of these acts, Roman Catholics being placed on the footing of protestant dissenters in respect of their educational, charitable, and religious establishments, the only question was, whether a trust in behalf of Roman Catholics, and for the promotion of Roman Catholic tenets, would be a valid trust if raised in behalf of dissenters and for the promotion of their peculiar doctrines. The cases in which similar charitable trusts for dissenting purposes had been established by the court, were, therefore, relied upon as equally applicable to the question then before it. The present Lord Cottenham, then Master of the Rolls, said that, as to the promotion of the Catholic religion, the cases which continually occurred of funds left to support the chapels and schools of dissenters, left no doubt in his mind as to the validity in law of the gift of the residue. He then proceeded to the question of the specific bequests. These he considered as having nothing of charity in their object. "The intention was not to benefit the priests or to support the chapels, but to secure a supposed benefit to the testatrix herself." His honour thought that the 2 & 3 Will. IV. applied "only to schools, places for religious worship, education, and charitable purposes (*q*). There can be no doubt, that the sums given to the priests and chapels

(*p*) 7 Ves. 496.

(*q*) Unless his honour is misreported in this respect, the language of the 1st section of the act seems to have escaped him. After

enumerating the above places of worship, education, and charity, it proceeds to say, "and the property held therewith, *and the persons employed in or about the same.*"

were not intended for the benefit of the priests personally, or for the support of the chapels for general purposes, but that they were given for the benefit of their prayers for the repose of the testatrix's soul, and that of her deceased husband." His honour admitted that the statute of Edward VI. "did not *declare any such gift to be unlawful*, but avoided certain superstitious uses previously created. The legacies in question, therefore, are not within the terms of the statute of Edward VI., but that statute *has been considered as establishing the illegality* of certain gifts; and, amongst others, the giving legacies to priests to pray for the soul of the donor, has, in many cases collected in *Duke (r)*, been decided to be within the superstitious uses *intended to be suppressed by that statute.*" The legacies to priests and chapels were therefore declared to be void in favour of the next of kin.

It is submitted, with every proper feeling of deference to so distinguished a judge, that the latter part of this decision can scarcely stand at this day. It proceeded upon an assumption of the real points in debate. It assumed that the illegality of superstitious uses during the long period preceding the 10 Geo. IV. was owing to their being supposed to be within the intention of the statute of Edw. VI., and the mischiefs against which that measure was directed. This is not the proper view in which the question is to be regarded. Neither that act nor its predecessor, the 37 Hen. VIII. c. 4, had any thing whatever to do with the illegality of those uses. It resulted from the general tenor of our legislation, and the views till lately prevalent of the public policy of the realm. It was therefore nothing more than a presumption, liable to be rebutted by direct evidence of a contrary intention, or to be destroyed by failure of its premiss. The Roman Catholic tenets being for the most part illegal down to the passing of the 31 Geo. III. c. 32, it followed, as a matter of course, that, down to the

(s) *Duke's Charitable Uses*, by Bridgman, p. 466.

same date, all endowments or gifts in promotion of those tenets, or in their obedience, were illegal likewise. And by an especial reservation in that act, such continued to be the law as to Roman Catholic charities after the passing of the act 31 Geo. III. c. 32, and down to the passing of the 10 Geo. IV. c. 7. We have already noticed the anomalous reservation of the law of charities and superstitious uses, from the general operation of the 31 Geo. III. c. 32, made by the 17th section. As to the cases collected in Duke's Charitable Uses, and relied on by the Master of the Rolls, they go the length of establishing this general proposition,—that *all* Roman Catholic charities were at that day superstitious and illegal. The illegality was not confined to uses expressed to be for the benefit of souls after death. Thus it is said (s), “that the giving of lands upon condition to find a priest is to a superstitious use; and, if one give 20*l.* per annum for the finding of a priest, . . . all shall go to the king;” and “if a priest have but a stipend out of the land, the king shall have but that stipend.” In all these cases there is no mention made of prayers or masses, nor of any other real or supposed benefit resulting to the soul of the founder or any other person. The provision for the priest alone sufficed to taint the above mentioned uses with superstition. And it is added, “that other like things to these may make the use superstitious, and put the land charged with it into the king's hands.” Indeed, a very small part in any of these decisions was due to the mere introduction of the trusts for prayers. In a charity case which came before the court in the reign of Charles the First (t), it was said that “if land be given to maintain a charitable use for relief of poor, and also that the schoolmaster or poor shall pray for the donor's soul, the charitable

(s) Duke, chap. 7, s. 1. See also
Adams and Lambert's case, 4 Co.
 Rep. 104.

(t) *Hynshaw and another v. The
 Mayor of Morpeth*, in Duke, chap. 6,
 c. 7.

use shall be said the principal intent of the donor, *and the praying for his soul but an accessory*; and therefore the charitable use shall support and preserve the land." In fine, the statute of Edward VI., like those that preceded it, was merely a temporary measure,—applying to the particular objects therein enumerated, the general prohibitions of practices hostile to the new constitution of church and state, with which, according to the theories of that day, the common law was already furnished. Thus more than 150 years later (*u*), a similar enactment vested in the crown, for the use of the public, estates previously given to superstitious uses. If its predecessor in Edward VI.'s reign had not been a mere temporary measure, the new enactment was useless.

On the other hand, the 37 Hen. VIII. c. 4, was intituled "*A Bill for Colleges, Chantries, &c.*" and the 1 Edw. VI. c. 14, which succeeded it, and to which such frequent reference has been made, is intituled, "*The Act for Chantries Collegiate.*" Both of these statutes vested in the crown, not only all existing obits and foundations for masses and prayers for souls, but also, with a few exceptions, all existing colleges, chantries, free chapels, and hospitals. Surely it is not to be said that all these uses alike were thereby made for ever superstitious, because existing gifts to such uses were all alike then appropriated by parliament and vested in the crown!

The decision in *West v. Shuttleworth* also assumed that prayers for the dead are at this day to be accounted as savouring so strongly of falsehood or superstition, as to demand the interference of the *parens patriæ*, and to invalidate any provision whatever to be made for their establishment. It would not, it is apprehended, in the least degree affect the question of the rights of Roman Catholics under the 2 & 3 Will. IV. c. 115, were it to appear that this doctrine is repugnant to the tenets of the Established Church. That act was passed to

(*u*) 1 Geo. I. st. 2, c. 50.

enable Roman Catholics to maintain and promote their peculiar doctrines, however much they might be found to differ with those of the Establishment. The protestant dissenters had enjoyed the same right for upwards of a century. That act placed them on the same footing in this respect with dissenters. Now, in the case of the *Attorney General v. Pearson* (x), Lord Eldon declared it to be clearly settled, that, "if a fund, real or personal, be given in such a way that the purpose be clearly expressed to be that of maintaining a society of protestant dissenters, *promoting no doctrines contrary to law*, although such as may be *at variance with the doctrines of the established religion*, it is then the duty of this court to carry such a trust as that into execution." And in the principal case, Lord Cottenham did not hesitate to apply the very same principle to the gift of the residue, and to uphold the trust for the promotion of the doctrines of the testatrix among the poor of Yorkshire. Yet it was notorious that among those doctrines, a belief in purgatory, and the efficacy of masses for the dead, held a prominent place, and that with the belief the practice would inevitably be introduced among the objects of her solicitude. With what reason, then, could the court claim to interfere with the specific bequests on the ground of their appropriation to superstitious purposes, at the very time that it supported them in connection with the trusts of the residue? Certainly it was argued at the bar that the act only enabled Roman Catholics to exercise those acts of piety and charity which were common to them with dissenters, and that therefore masses for the dead were not within the scope of their authority. But in effect this argument, if seriously meant, would reduce the relief conferred by that act to a mere nullity. There would have been no occasion for any enactment at all on the subject. The law, even down to the 10

(x) 3 Meriv. 409.

Geo. IV. c. 7, was forcibly said by Sir William Grant (*y*), to have been so settled, that “ whenever a testator is disposed to be charitable in his own way and upon his own principles, we are not to content ourselves with disappointing his intention, if disapproved by us ; but we are to make him charitable in our way, and upon our principles. If once we discover in him any charitable intention, that is supposed to be so liberal as to take in objects, not only not within the intention, but wholly adverse to it.”

But independently of these very obvious objections to the decision in *West v. Shuttleworth*, it may be reasonably doubted whether even a protestant endowment for prayers for the dead would, at this time of day, be regarded as illegal or superstitious. The old cases proceeded upon the assumption of its being a practice opposed to the doctrines and discipline of the Established Church. The same notion seems to have been entertained as well by the court as by the counsel in the principal case. But since the decision of that case, the question has been differently determined in the Ecclesiastical Court. In the cause of *Breeks v. Woolfrey* (*z*), the vicar of Carisbrooke cited Mary Woolfrey of that parish to answer for erecting a tombstone in the churchyard there, to the memory of her deceased husband, with an inscription alleged to be “ contrary to the Articles, Canons, and constitution, or to the doctrine and discipline of the Church of England.” The inscriptions were set forth in the Articles, and were as follows, “ *Spes mea Christus.*” “ Pray for the soul of J. Woolfrey.” “ It is a holy and wholesome thought to pray for the dead.” “ 2 Mac. xij. 46.” “ J. W. obiit 5. die Jani. 1838, æt. 50.” Sir Herbert Jenner said that prayers for the dead were not necessarily connected with a belief in purgatory ; that the latter alone was repugnant to the doctrines of the Church of England ; and that the former were not. “ If it had

(*y*) *Cary v. Abbot*, 7 Ves. 495.

(*z*) 1 Curteis, 880.

been the opinion of the framers of the Articles and Canons of the church, that prayers for the dead were opposed to the Scriptures, they would have expressly declared their illegality. I am of opinion, that there has been no violation of any of the Articles of the church . . . and that, if the Articles were proved, the facts would not subject the party to ecclesiastical censure, as far as regards the illegality of the inscription on the tombstone. . . . The court, therefore, is bound to reject the Articles altogether, and to dismiss the party, and with costs."

Now it is certain, that this would not have been law a few years ago, when a very different opinion on the doctrine and practice of prayers for the dead was, perhaps, universal in the Church of England. If this be now the law, the general doctrine of *West v. Shuttleworth* must be taken with very great qualification. Certainly, in the cases that have come before the courts, involving points of a religious or polemical nature, the prevailing opinion in matters of theology has always influenced the judges by whom they have been decided. There is a remarkable expression reported to have been used in a modern case at the bar of the House of Lords, which may illustrate this proposition (*a*). To an ancient decision upon the meaning of the statute *de Religiosis*, it was boldly objected;—"The true answer is, that the power of the church was so very great in those days, as might probably have an influence upon the proceedings in Westminster Hall. *But it is to be hoped now, that there will be no partiality in favour of papists, and in prejudice of a protestant heir.*" For the old rule, *summa est lex quæ pro religione facit*, must, from its very nature, be uncertain in its application, and for ever fluctuating with the progress or recess of the religious belief of the nation. And thus, as a late author (*b*) has quaintly remarked upon another point closely allied to the one before us, it must

(*a*) *Roper v. Radcliffe*, 10 Mod. 242. (*b*) Boyle on Charities, p. 256.

often happen that “the subject of the law’s application, and not the common law itself, has become matter of change; just as if a piece of metal were withdrawn from the stroke of a hammer, and a piece of different metal put in its place, the action of the instrument would (the strokes being equal) remain as before, though the substance to which its power was applied would have been changed.”

It is difficult to understand the distinction taken by the Master of the Rolls, as to the operation of the statute of Edward. That statute “did not declare any such gift to be unlawful, but only avoided certain superstitious uses previously created.” And yet that statute “had been considered as *establishing the illegality of certain gifts*; and amongst others,” these gifts had been decided “to be within the *superstitious uses intended to be suppressed* by the statute.” It may, indeed, be true that such was the intention of the statute; though it was certainly not confined to obits and masses, but, like its predecessor, the 37 Hen. VIII. c. 4, embraced chapels and even colleges and hospitals, bore the title of “The Act for Chantries Collegiate,” and, above all, related only to lands and their issues, and the household goods of the suppressed colleges. But the question is not what uses were intended to be suppressed by that enactment. It can be of no importance to know whether it was directed against many or few of the “superstitious uses *previously* created.” If it were, then the act would prove too much; for hospitals, colleges, and free chapels were within its provisions equally with obits, masses, and chantries; and in that hypothesis the superstitious character of the one was no greater than that of the other. According to this view, therefore, obits and masses for the dead, as they shared in the general condemnation of popish uses supposed to have been intended by the 1 Edw. VI. c. 14, so would deserve to participate similarly in the general relief afforded by the 2 & 3 Will. IV. c. 115. But this argument is quite un-

necessary. The true question is;—Had “The Act for Chantries” the effect of invalidating any and what future gifts? The cases collected by Duke must have been decided in precisely the same manner, even if the statute of Edward had never passed. So long as popery was considered a conspiracy against religion and the state, popish practices would of necessity have been discouraged and put down by the courts, no less than by the legislature. And although the courts unnecessarily endeavoured to support some of those clear and obvious decisions by an artificial straining of what they termed “the equity and purview of the act” of Edward VI. in preference to the broad ground of the constitution as understood during the ascendancy of Reformation principles, it is evident from the cases of the *King and Queen v. Lady Portington* (c), *Cary v. Abbot* (d), and even *West v. Shuttleworth* (e), that modern judges have taken a very different view of the validity of those reasonings. “The 1 Edward VI.,” said Lord Holt in the first case, “gives to the king, but does not extend to future uses since.” In the next case Sir William Grant observed, “there is no statute making superstitious uses void generally. The statute of Edw. VI. relates only to superstitious uses of a particular description then existing. The statute of Hen. VIII. relates only to assurances of land to churches and chapels, which, if for a longer period than twenty years, it declares absolutely void (f). The statute of George I. was only temporary.” And as we have seen, Lord Cottenham, in the last case, admitted the correctness of the positions propounded as above by Lord Holt and Sir William Grant. But the Master of the Rolls did not perceive the inconsistency of those positions with the reasons given in Duke for the decisions there collected. Those decisions are maintainable upon the broad ground of a supposed public policy, which, at that day, was univer-

(c) 12 Mod. 31.

(d) 7 Ves. 495.

(e) 2 M. & K. 697.

(f) This statute (23 Hen. VIII. c. 10) was, properly speaking, a mortmain act.

sally recognised both in parliament and on the benches of justice. On the other hand, those who so argue are bound to conclude that, independently of the 2 & 3 Will. IV. c. 115, those decisions are no longer in force at this day. But if the opposite assumption be correct, and the statute of Edw. VI. be capable of a construction according to its "equity and purview," there can be no doubt that, independently of the 2 & 3 Will. IV. c. 115, the case of *West v. Shuttleworth* was well decided, and that the odium of straining the letter of a penal and disabling act must continue to be borne by courts of equity.

The attention of the court in the following case (*g*) does not seem to have been called immediately to the state of the law between the passing of the 10 Geo. IV. c. 7, and the 2 & 3 Will. IV. c. 115. There the main question seems to have been whether the case had been in litigation before the passing of the latter act, within the meaning of the 3rd section; and on that one point Lord Langdale, the Master of the Rolls, decided against the legality of the charitable use. Ursula Mountney, by her will, dated the 16th of July, 1680, gave to Ralph Clavering and his heirs, a rent-charge of 32*l.*, and subject to it, she gave lands to William Lord Widdrington and his heirs. A paper of instructions, dated the 21st of August, 1680, recited the gift, and the necessity imposed upon her by "the malignancy of the times" of concealing the uses of the rent-charge. It then proceeded, among other things, to direct its disposition; 20*l.* of it were to go "to the priest at Stonecroft, for his maintenance, to be paid yearly." The remainder was to be distributed in specific sums, annually, among the poor of Hexham and other parishes. There was no mention of prayers for the dead. In 1693 the land was conveyed, by the devisee, subject to the rent-charge, to Thomas Gibson, in fee. The purchaser covenanted that he would pay the rent-charge

(*g*) *Attorney General v. Todd*, 1 Keen, 803.

to the heirs and assigns of Ralph Clavering. In 1816, Jasper Gibson, the then owner, conveyed the land to trustees for sale; and in 1822 it was bought by the defendants' testator, John Todd, at a public sale; it was described in the printed particulars as being "subject to a rent-charge of 32*l.* a year." Up to the time of this purchase the 10*l.* a year were regularly distributed among the poor. On the 22nd of September, 1830, John Todd died, having made the defendants his executors, and having devised the land so purchased to one of them. Neither the testator nor the defendants ever paid any part of the 20*l.* annuity secured to the priest, from the period of the purchase. An information was filed on the 5th of September, 1831, against Edward Clavering, heir of the original trustee of the rent-charge, but the rent-charge having been previously assigned to the defendant Leadbitter, the information was amended on the 11th of January, 1833, by substituting his name in the place of Clavering's. Between these dates the 2 & 3 Will. IV. c. 115 had passed; and the only question raised by the counsel for the trustee of the rent-charge was, whether the information could be said to have put the matter in litigation before the passing of the act, within the meaning of the 3rd section? Lord Langdale said, that it was impossible for him "to consider that this suit was not commenced, and that this rent-charge, as against the property charged with it, and the persons liable to pay it, was not in litigation, discussion, and dispute, at the time when the statute was passed." The case was therefore to be determined as if that act had not passed. Before that act "there could, I apprehend, be no doubt that the proposed mode of carrying the charitable intention into effect was illegal, and the crown would have been entitled, under the king's sign manual, to direct the application of the fund to other charities in a legal mode." His lordship decided according to that view of the case. Indeed the endowment was already vested in the crown for public purposes, by the operation of the 1 Geo. I.

st. 2, c. 50. That point, however, was not raised on this occasion; and the decision rested on no other grounds than those already stated. It is, therefore, not very easy to be reconciled with principle. It is to be regretted that the attention of the court was not directed to the 10 Geo. IV. c. 7, and its operation on the old law of superstitious uses. No doubt, under the old law, "the proposed mode of carrying the charitable intention into effect was illegal," but only on the ground of a supposed public policy, gathered by a necessary presumption from the general scope and tenor of our former legislation. The last Relief Act was passed in derogation to the enactments that had furnished that presumption;—and, containing no reservation whatever in its favour, must be taken to have rebutted it. In other words, the 10 Geo. IV. c. 7 relieved her majesty's Roman Catholic subjects from disabilities, presumed to have been necessarily intended by former acts, when it relieved them from such as were inflicted by the acts themselves on which such presumption was based. What Lord Mansfield is reported to have said of the Dissenters' Toleration Act is equally true of this (*h*). It has put the religion it protects, "not merely under the connivance, but under the protection of the law,—*has established it.*" Roman Catholics, "therefore, are restored to a legal consideration and capacity." Yet if this construction be true, it is impossible to contend that the cases of *West v. Shuttleworth*, and *The Attorney-General v. Todd*, ought to be considered law. But on the other hand, it is quite clear that, whatever the case may be with endowments of a date subsequent to the passing of the acts for the confiscation of the like, those enactments are still in force as far as respects anterior endowments. This principle has been very distinctly recognised in the late case of *The Attorney-General v. The Fishmongers' Company*, decided by Lord Langdale, M. R. (*i*).

(*h*) *Evans v. The Chamberlain of London*, 2 Burn, Eccl. Law, 207. P. C. 181, (in Error).
 And see *Harrison v. Evans*, 6 Bro. (*i*) 2 Beav. 168.

Mortmain.

By the 5th section of the 2 & 3 Will. IV. c. 115, all property to be acquired or held under the authority of that act, for Roman Catholic purposes, shall be subject to the provisions of the last Mortmain Act (9 Geo. II. c. 36). Under the last mentioned enactment, no hereditaments, corporeal or incorporeal, nor personal estate to be laid out or disposed of in the purchase of lands, tenements, or hereditaments, shall be any ways conveyed or settled, charged or incumbered, by any person or persons, for the benefit of charitable uses; unless by deed indented, executed in the presence of two credible witnesses, twelve calendar months at least before the donor's or grantor's death (both inclusive), and enrolled in Chancery within six calendar months after execution;—(or, in the case of public stocks to be applied in the purchase of lands, &c., by transfer in the public books, six calendar months before the donor's or grantor's death, both inclusive;) unless the charitable use be made to take effect in possession without any power of revocation, reservation, trust, condition, limitation, clause, or agreement for the donor's or grantor's benefit, or of persons claiming under him, (s. 1). If the founder, however, merely reserve to himself the power of regulating the charity, this will not make the deed void (*k*). But (s. 2) these restrictions as to the twelve calendar months before execution of deeds, and of six calendar months before transfer of stock, shall not extend to *bonâ fide* purchases for a full and valuable consideration, actually paid at or before the time of conveyance or transfer. The restriction as to the mode of execution and enrolment, however, is not removed by this clause. But the 9 Geo. IV. c. 85 declares valid all such purchases, previous to that act, although the requisite formalities might not have been observed. It does not extend, however, to any deeds or assurances at that

(*k*) *Grieves v. Case*, 2 Cox, 301.

time in litigation, nor to any which have been made after the passing of the act. But by a subsequent enactment (4 & 5 Vict. c. 38, s. 16), all conveyances for *educational* purposes, made previous to that act, and for valuable consideration, but not enrolled as required by the 9 Geo. II. c. 36, shall nevertheless remain valid until the 21st of June, 1842, and, if enrolled before that day, shall continue to be valid for ever after. But deeds already avoided at law or in equity are not to be affected by that enactment.

All other gifts made otherwise than as directed by the 9 Geo. II. c. 36, s. 1, excepting gifts to the universities of Oxford and Cambridge, or to the colleges of Eton, Winchester, and Westminster (s. 4), are declared to be absolutely null and void, (s. 3). They are avoided, however, in favour not of the crown, but of the heir-at-law (*l*).

The 4 & 5 Vict. c. 38, was passed for affording further facilities for the conveyance and endowment of sites for schools. By section 2 to section 9 inclusively, any persons seised in fee, in tail, or for life, of freeholds or copyholds, and having the beneficial interest in their seisin,—or their representatives in certain cases of disability,—any corporations, officers, justices, trustees, or commissioners holding land for public or charitable objects,—the chancellor of the Duchy of Lancaster,—and the officers of the Duchy of Cornwall,—are empowered to grant, convey, or enfranchise, by way of gift, sale, or exchange, any quantity of land as sites for schools for education of poor persons, or for residences of their schoolmasters or mistresses, or otherwise, for their education in religious and useful knowledge. But the site of each school and residence must not exceed the extent of one acre, and no more than one such site must be in each parish. Upon their ceasing to be held for their original purposes, the sites are, in certain cases, to revert to the estate of which

(*l*) *Corbyn v. French*, 4 Ves. 433.

they were parcel before such conveyance. But the trustees are empowered by the 14th section to sell or exchange any site for a more eligible one, with the consent of the proper authorities. No bargain and sale, nor livery of seisin,—nor, it should seem, any enrolment,—will be requisite to give effect to conveyances under this act; of which conveyances a short form is given in the 10th section. And only one witness to the execution by each party is required.

Besides the general provisions of the Mortmain Acts, Roman Catholic foundations are also considerably affected by an act of Henry the Eighth's reign for the better protection of feudal rights, but certainly not out of any regard to the ecclesiastical policy of that period, nor with any hostile feeling to superstitious uses as such, notwithstanding the extra-judicial dictum to the contrary of Mr. J. Abbott (*m*). The 23 Hen. VIII. c. 10 is intituled, "An Act for Feoffments and Assurances of Lands and Tenements made to the Use of any Parish Church, Chapel, or such like." It recites the recent growth of the same losses and inconveniences to the king and other lords and subjects of the realm as by alienations in mortmain, from the practice of conveying or devising real estate to the use of, or in trust for, churches, &c. "guilds, fraternities, commonalties, companies, or brotherheads, erected and made of devotion, or by common assent of the people without any corporation," or "to have obites perpetual, or a continual service of a priest for ever, or for three-score, or fourscore years." All such uses, intents, and purposes, and all collateral assurances in fraud of the statute, are, by the 2nd and 4th sections, declared to be utterly void, and of no strength, virtue, nor effect. The heirs-at-law, and not the crown, will therefore be entitled.

Ancient customs to devise in mortmain within cities and towns corporate, are reserved from the operation of this act by the 5th section, and two cases then pending

(*m*) *Doe dem. Wellard v. Hawthorn*, 2 B. & A. 103.

were also reserved by special mention in section 6. And by section 3, power is given to all persons beneficially interested in manors, lands, tenements, or hereditaments, to convey or devise to any of the above uses, intents, or purposes, for any periods not exceeding twenty years.

This act must of course be read with the 9 Geo. II. c. 36, which takes away the right to devise in mortmain, and substitutes the deed of bargain and sale, enrolled in the room of every other kind of conveyance. Of course the chapels or places of worship of Roman Catholics are not affected by this act. But their guilds, and such other voluntary associations as are not illegal, their obites, and probably their masses for the departed, are still within its provisions. To such uses, therefore, notwithstanding the more recent enactments, it is not competent for them to appropriate real estate, in manner required by the 9 Geo. II. c. 36, s. 1, for a longer period than twenty years.

Disqualified Papists.

It is unnecessary to mention that the relief afforded by the various acts passed in favour of Roman Catholics no more extend to foundations, whose founders or objects are not qualified according to the provisions of those acts, than they do to the persons themselves. Such foundations, therefore, are still contrary to law, even as such persons are still beyond the pale of the constitution. A neglect to obey the law,—an omission of the formalities prescribed by it,—deprives the offender not only of direct relief, but also of collateral relief under it. Such charities, therefore, will be at the disposal of the crown, and their future application will have to be directed by the queen's sign manual. But the power of the crown and the court in such cases is never exercised in an arbitrary manner. The new application of the charity will be as *cy-près* as possible. The religion, purposes, and predilections of the incapacitated donor will be taken into consideration; and the bounty which he had destined to an illegal purpose will be applied to a similar one not tainted with ille-

gality. Thus, if the object itself be legal, and the incapacity be only personal as to the donor, as founded on his own want of a proper qualification at law, there is every probability that the crown will direct the application in favour of the original object. If, on the other hand, the incapacity be confined or extended to the latter, then there is every reason to suppose that another Roman Catholic charity, unexceptionable at law, but otherwise answering, as nearly as possible, the description of the first, will be selected by the crown. In the case of *The Attorney-General v. Matthews* (n), an appointment to the use of the poor in general, was held too vague to be carried into effect otherwise than at the discretion of the crown. Lord Keeper Finch, however, intimated that there was a limit to that discretion. "This general charity belongs to the king himself to dispose of it, *yet so as for the poor.*" And, accordingly, it was applied for the maintenance of poor scholars in Christ's Hospital. It has been well said, that whether the court or the crown executes the charity, the constitution finds a trustee in the court or the king, who would so act as to exercise their discretion with a view to the intention. Those whose duty it is to advise the crown, will think themselves, equally with the court, bound to attend to any particular object which may have been indicated (o). It is upon this principle that the courts act every day, when gifts or bequests to such vague purposes as "the preaching of God's word," the promotion of the "Catholic," or the "Catholic Christian religion," and the like, are the subjects of investigation. The religious opinions of the party using these expressions are first ascertained, if possible, and his language is then construed according to the sense which he himself must have attached to it (p). It is

(n) 2 Lev. 167.

(o) Wilm. Op. & Judg. pp. 28—35; 7 Ves. 87; 15 Ves. 233.

(p) *Att. Gen. v. Hickman*, 2 Eq. Ca. Abr. 193; *Att. Gen. v. Pearson*,

3 Meriv. 417; *S. C.* 7 Sim. 307, and the case cited *in notis*; *Bradshaw v. Tasker*, 2 M. & K. 221; *West v. Shuttleworth*, 2 M. & K. 684; *Grieves v. Case*, 4 Br. C. C. 67.

true that the present Vice-Chancellor has intimated an opinion which would go far to deprive disqualified Roman Catholics of the benefit of this liberal rule of construction. In the case of *The Attorney-General v. Pearson* (q), his honour is reported to have expressed himself to the following effect: "The state of the law, at the time when the gift was made, or the trust created, is not to be disregarded. It must be regarded in some sense and in some degree; because it may assist in determining what were the opinions of the persons who created such a religious trust as we find in this case. And, if we do find that at that time, the preaching and promulgating certain doctrines and opinions were prohibited by the statute law, it may be reasonably inferred, that the persons who created the trust for the worship and service of God, did mean such a trust as would not include the promulgating of those doctrines and opinions, which, at the time, it was illegal to promulgate." But if this decision can be now supported at all, it must be taken to have invalidated, among others, all Roman Catholic foundations or gifts whatever, to charitable purposes, expressed in the vague terms already noticed, and made anterior to the passing of the 10 Geo. IV. c. 7, and, perhaps, the 2 & 3 Will. IV. c. 115. Now, in the cases of *West v. Shuttleworth*, and *Bradshaw v. Tasker*, already cited, the language of the gift was as vague as that in *The Attorney-General v. Pearson*; the words "Catholic," and "Catholic Christian," were employed, and not "Roman Catholic." In both cases the bequests were much anterior to the passing of the 10 Geo. IV. c. 7. But the court in both cases interpreted the bequests as having been destined for Roman Catholic purposes, and upheld them as such. Yet, when they were made, those purposes were clearly illegal under the 31 Geo. III. c. 32, s. 17 (r). It is impossible to reconcile these later decisions of Lords Brougham and Cottenham with the Vice-Chancellor's observations cited above.

(q) 7 Sim. 306.

(r) *Cary v. Abbott*, 7 Ves. 495.

It should be observed, moreover, that they were by no means essential to his honour's judgment delivered in that case. The better conclusion would, therefore, seem to be that even an illegal Roman Catholic charity, whether of ancient or modern foundation, will not be so avoided by the court or by the crown, but that some legal charity of the same religious denomination, and no other, will be directed to receive the benefit of the new application.

CHAPTER IX.

CHARITABLE DISPOSITIONS OF ROMAN CATHOLICS

ENFORCED BY COURTS OF JUSTICE.

THAT a gift to a clergyman of the Roman Catholic Church, of a sect of dissenters, or even of the Establishment, may obtain the character of charity, it is not enough that it should have been made to him in his official capacity. There must also be a distinct indication of intention that he is to take the gift not in his personal character, but in that of his sacred office. In the first case the donee will be entitled absolutely and for his own benefit: in the latter he will hold it only so long as he is minister, and the benefit of it will attach to his successor in that office. On the other hand, it affords no kind of objection to the gift being intended for a charitable purpose, that a personal preference of any one individual has designated him in particular to be the first object of the donor's confidence or even of his bounty, provided that the general charitable purpose appears with sufficient clearness. But such an expression of confidence or preference will sometimes have the effect of partially upholding a trust which it is otherwise incompetent to the court to carry fully into execution in the manner pointed out by the donor.

In the case of *The Attorney General v. Power* (s), a sum of money was bequeathed by a Roman Catholic lady in Ireland to two persons respectively described as "the Roman Catholic Archbishop of Cashel, and the Roman Catholic Bishop of Waterford and Lismore, and to their successors for ever." There were trusts for the

(s) 1 Ball. & Beat. 145.

benefit of twelve decayed gentlemen, and for the support and education of poor boys to be selected by the trustees and their successors. Lord Chancellor Manners held, that as respected the legal estate, this disposition was made to persons in a character that could not be supported. But, as the testatrix seemed to place a personal confidence in the two individuals she had named, his lordship committed the execution of the charitable trusts to them under the direction of the court, for their joint lives, upon a reliance that they would give no undue preference to Catholics over Protestants. With reference to this restriction it must be observed that the testatrix had omitted to confine the benefit of the charity to Roman Catholics by express words. But it may be very well questioned, whether, at this day, the court would follow Lord Manners in extending to persons of a different religion from that of the testatrix, a trust for *educational* purposes. In other respects the decision was doubtless a correct one, as it would have been impossible for the court to have provided for the regular appointment of the ecclesiastical successors of those prelates, *eâ ratione*, to be trustees in their room. That difficulty, however, is not likely to arise in England, where the ancient sees have not been retained by the prelates of the Roman Catholic Church of the country. The case has been merely cited as indicative of the leaning of the court in favour of the personal preferences of donors to charitable purposes.

In *Doe v. Aldridge* (t), land was devised to the defendant, a dissenting minister, for his life, upon condition to settle and convey the same to trustees "to take place at his decease, for the use and support of the preaching of the word of God at the meeting-house at Lyndhurst for ever," with a provision for a school in case the preaching should be discontinued. The testator, in a subsequent part of the will, declared that he did

(t) 4 T. R. 264.

“ expect that the devisee would, with the help of God, after the testator’s decease, without delay settle and forward every thing in his power to promote and carry on the word of God, both in his (Aldridge’s) lifetime, and after his decease.” The Court of Queen’s Bench, in the absence of Ashurst and Buller, JJ., held that the defendant’s life estate was not a charitable use, nor within the Mortmain Act, and therefore good ; although the subsequent limitation was clearly void for the opposite reason. The court thought, that although the word “ expect ” was sufficient to raise a trust, it was not connected with a sufficiently distinct object. But Lord Commissioner Ashurst afterwards observed, that, perhaps the case was “ not so much looked into as it might have been ” (*u*). It is certain, that in a multitude of cases, language as vague as that employed in the case of *Doe v. Aldridge* has been held sufficiently descriptive of the object of charity, where the donor’s own religious opinions were ascertained. However, this common law case is certainly authority thus far, that some other indicia of a charitable and not a personal intention must be looked for, even where the donee is described by his official character.

In *Grieves and others v. Case and others*, already cited, money was bequeathed to trustees to be laid out in the purchase of lands, the rents and profits of which, subject to certain annuities, were to be divided equally between Thomas Mendham, of Briston, teacher of the Gospel, for his life, and Samuel Easthaugh, of Fakenham, teacher of the Gospel, for his life. After Mendham’s death, one third part of the interest or rent was to be paid to the preacher or teacher for the time being, who should statedly officiate in Briston chapel, belonging to Mendham, and the other two thirds were to be paid to Easthaugh for life; he and the said preacher changing their chapels on alternate Sundays. If either

(*u*) *Grieves and others v. Case and others*, 2 Cox. 311 ; 1 Ves. jun. 553.

Mendham or Easthaugh should voluntarily withdraw from Fakenham chapel, or refuse to officiate there when able, his share should go to the preacher chosen in his stead. After the decease of the survivor of them, the interest or rents were to be paid for ever, two thirds to the Fakenham preacher, and one third to the Briston preacher for the time being, alternately officiating in both chapels. The testatrix desired that Easthaugh should not be a stated preacher at Fakenham chapel, nor enjoy the benefit intended by her will, any longer "than he continued to preach the Gospel of Christ Jesus." The lords commissioners held these uses to be charitable, and void within the statute of Mortmain; and that the personal bounty and favour to Mendham and Easthaugh were not enough to take their case out of the statute.

In *The Attorney General v. Cock* (x), an annuity was given to "the minister belonging to the meeting-house at Marloes," and in case it should cease to be used after her death, then "to the minister of any other place the protestant dissenters, called Baptists, should meet in, provided it were in the parish of Hemel Hempstead," with power of entry and distress to the said minister. Philip James was minister at the making of the will and at her decease, and he was a legatee in that capacity of 50*l.* absolutely to his own use. It was contended that the gift of the annuity was likewise personal, but Sir William Strange, M. R., held that it was a charitable disposition, and intended for all the ministers in succession.

We shall now see to what extent the courts have gone in the application of such gifts, when ascertained to be charitable.

The effect of the Protestant Toleration Acts was "to restore dissenters to a legal consideration and capacity." It put their religion "not merely under the connivance, but under the protection of the law—it *established* it" (y).

(x) 2 Ves. sen. 273.

Burn, Eccl. Law, 207; App. to Fur-

(y) Per Lord Mansfield in *Evans*

neaux's Letters to Blackstone.

v. *The Chamberlain of London*, 2

Such, too, has been the result of the various acts passed for the relief of Roman Catholics, and the protection of their worship. They are restored to a "legal consideration and capacity,"—their religion is not only connived at, but "protected," not only protected, but "established." It followed, therefore, that the courts would be occasionally called upon to adjust the charities of Roman Catholics, to the same extent as they had formerly done where dissenting charities happened to come in question. In these cases no difficulty could be felt, if the manner of the interference had been specified by distinct enactment. Thus, under the 4 & 5 Vict. c. 38, s. 18, two justices in petty sessions are bound, on complaint of the trustees or managers of any school within that act, to issue a warrant against a dismissed master or mistress who refuses or neglects to give up possession; and by such warrant to compel possession to be given up in the manner pointed out by the Speedy Recovery of Tenements Act. But there may arise other cases, where the legislature has been silent, and where the proper course is not so clear. It is certain, that in adjusting a disputed charitable trust, for the promotion or maintenance of Roman Catholic doctrine or worship, the courts must, of necessity, have regard to Roman Catholic laws, ritual, discipline, and, in short, to every thing that appears upon credible testimony to be the undisputed practice of their church within this realm. The bulls, briefs, or rescripts of the pope, the mandates of the congregation of the Propaganda, and whatever else may tend to show the character of persons or of property, the obligations of the former, or the trusts of the latter, are, in this view of the case, clearly legitimate documents, and as such properly admissible in evidence, the formalities of courts of justice being complied with. Yet, as we have already seen, the law is ominously silent on this point. And the law of premunire still frowns from the statute book (z).

(z) *Ante*, Chap. V.

The courts, therefore, will enforce the discipline of the Roman Catholic Church whenever it is necessary to the faithful administration of a trust for religion, education, or other charity. But the nature of the usage or law relied on, must be clearly alleged and proved: the court is not judicially acquainted with the laws of any church, but the Church Established. In the same manner it is, that even the courts of common law will entertain applications for redress made by aggrieved ministers deprived or suspended by their ecclesiastical superiors; and will give damages, if the proceeding be by an action on the case; or will even restore applicants, where the prerogative process of mandamus has been resorted to. In order to ground an application of this nature, it is necessary that the Roman Catholic minister, claiming the interference of the temporal court in matters of ecclesiastical discipline, should show a *primâ facie* title to the office to which he solicits to be admitted or restored. In one case (z) a mandamus was moved for against the trustees of a Baptist meeting-house, requiring them to restore John Lloyd to the office of minister of the congregation, and to the use of the pulpit. Lloyd's affidavit stated it to be his supposition, and that of other Baptist ministers, that his election was for life. But it appearing from the counter affidavits, that Lloyd had not obtained a proper license under the act of parliament, and that he had not, at any time after being chosen, received ordination at the yearly meeting of Baptist ministers, as required by the usages of that sect, the court refused the application. Lord Kenyon said, that a party applying to be restored to an office, ought to show "that he has complied with all the forms necessary to constitute his right." His lordship also seemed to think, that Lloyd should have shown his compliance with the requisites of the Toleration Act. The court also thought that he should have shown the ground of his supposition.

(z) *Rex v. Jotham*, 3 T. R. 575.

But where there is no such objection to the interference of the court, a mandamus will issue to restore a party wrongly deprived of an ecclesiastical office among religionists not of the Established Church (*a*). Dr. Wachsell had been regularly appointed by a congregation of German Lutherans in London to be their minister; and, under that appointment, became entitled to a house and stipend. Afterwards he gave offence to his congregation by several acts of misbehaviour and improper conduct; and all, but a very inferior number, concurred, and turned him out. He applied to the court for a mandamus to be restored, which, in Easter Term, 1780, he obtained: the reasons of the judges being, that "the congregation had expelled without hearing him, and had not made a proper inquiry into the charges alleged against him, by delivering them personally to him, and calling upon him for his defence." A similar case was argued in the Queen's Bench, in Easter and Trinity Terms, 1783 (*b*). It was a disputed election to the ministry of a dissenting congregation at Leek in Staffordshire, between two candidates, of whom one was in possession of the pulpit. The other moved for a mandamus to be admitted. The court, previously to granting it, directed an issue to try the merits of the election. A verdict was returned, and the losing party at once submitted to it.

So in the case of the *King v. Barker* (*c*), a mandamus was moved for in the Court of Queen's Bench, requiring certain trustees of a dissenting meeting-house at Plymouth, to admit one Christopher Mends to "the use of the pulpit" in the meeting-house, as "pastor, minister, and preacher there," he having been duly elected thereto. An affidavit was produced of the facts and of his election, as, also, of the demand and refusal of the use of the meeting-house (*d*). The motion was opposed by the

(*a*) 2 Lud. 437, 439, note.

(*b*) *Chadwick v. Smith*, 2 Lud. 438.

(*c*) 3 Burr. 1265, 1379.

(*d*) It would seem, from the case of *Rex v. Jotham*, 3 T. R. 577, that

even in the case of a mandamus to admit, an affidavit of qualification and registry, under the Dissenters' Toleration Act, ought to have been produced.

trustees, and the election of the other candidate, whom they had put into possession of the meeting-house, was supported by affidavit. They declined, however, to have it tried by a feigned issue. The court granted the mandamus. Lord Mansfield said : “ The right to the function is the *substance*, and draws after it every thing else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit, in this case, follows by necessary consequence the right to the function of minister, preacher, or pastor ; as much as the *insignia* do that of mayor, or the custody of the books that of a town-clerk. Many cases have gone as far as this, or farther.” Ultimately both parties agreed to go to a new election, when a peremptory mandamus was awarded by consent upon both sides. But although it is competent to a minister, whom the trustees have improperly excluded from his pulpit after a regular election by the congregation, to apply for a mandamus against the former to restore or admit him to that right, the election gives him no legal estate in the chapel itself, or the ground belonging to it. He is a mere tenant at will of the premises to the trustees, with a right to the use of the pulpit, which has been said to be “ like an easement, a right of common, or of way ” (e). And, therefore, in the case just cited, it was decided that the defendant Jones had no right to hold the chapel, dwelling-house, and premises, after possession had been demanded by the plaintiff, who was heir-at-law of the last surviving trustee. The defendant Jones had been put in possession of the premises sixteen years before, by authority of the trustees, upon being elected minister ; but in 1828, it was determined, by a large majority of the congregation, that he should be changed ; in consequence of which, possession was demanded by the plaintiff. No other minister, however, was elected in his room. The court intimated, that he might have a remedy in equity, “ if they had improperly turned him out.” It is

(e) *Doe dem. Jones v. Jones and others*, 10 B. & Cr. 721.

apprehended that the same remedy would have been afforded him by mandamus. In another case (*f*), reported immediately after the one last cited, the same question occurred. There had been an election of a minister, and an induction by trustees, followed by a resolution of the congregation for his removal, and a demand of possession by the same trustees. It was objected, that he was not strictly tenant at will; that his right to the occupation of the house was part of the reward to which he was entitled for his services; and that his annual salary of 20*l.* was the other part of the remuneration. It was, therefore, insisted, that he was entitled to some notice of the determination of his tenancy, at all events, for the purpose of removing his goods. Lord Tenterden held otherwise, observing that there was no authority in the law for such a position.

The only remedy which the ministers could have had in these two last cases, was by mandamus at common law, or by bill in equity. It was quite immaterial whether they had been improperly removed or not: the freehold being in the trustees, they were clearly tenants at will, in the eye of law, and liable to be ejected at any time. But the trustees were, in their turn, responsible to the court in the exercise of their dry legal right, and might have been compelled at any time to re-admit the minister in each instance, if a case of injustice or precipitancy had been stated to the court. For this purpose, however, the writ of mandamus, or a bill in equity, would have been the only proper course to be taken. It was quite impossible to set it up as a defence to the action of ejectment. But in these cases the congregation had deposed the minister before the trustees demanded possession. It was clear, therefore, that the possession was determined. But it is at least doubtful whether so summary a procedure could have been resorted to, if the congregation, the governing body, according to the church discipline of those sects,

(*f*) *Doe dem. Nicholl v. M'Kaeg*, 10 B. & Cr. 722.

had refused to interfere. In such a case it is submitted that mere tenancy, at the will of the trustees, is scarcely a true description of the minister's right to occupy the chapel and its appurtenances; and there seems every reason to interpret it to be in the nature of a tenancy at will of two lessors, yet so as that both must concur, in order to determine it. Or, if the annual salary continuing to accrue and be paid by the congregation, (which was not the case in *Doe v. M'Kaeg*, last cited,) the minister's occupation could be interpreted to be a tenancy from year to year, he would be entitled of course to the usual notice to quit. And in either of these cases time would thus be obtained to apply to the court for a mandamus, or to take the more preferable course of a suit in equity. However, there is, as has been already intimated, another common law remedy to which a deprived minister may have recourse. The action of trespass upon the case is a general mode of redress for consequential injuries, and damages may be recovered in such an action by a minister wrongfully and maliciously deprived or suspended by his ecclesiastical superior. But as the law will not necessarily imply that the plaintiff has been damnified by his removal, he must state the particular damage he has sustained, or he will not be permitted to prove it at the trial. The declaration should state his employment as officiating minister at the licensed chapel in question, and that he had derived profit and emolument from it, and that in consequence of his deprivation or suspension, "persons frequenting the chapel had withdrawn from him their countenance and support, and had discontinued giving him the gains, profits, &c. which they usually had, and otherwise would have given him." It is not necessary, however, to name such persons; nor is it necessary to state that the minister was licensed, for the court will presume it, when it appears upon the record that the chapel is licensed (*g*).

In the last case the court would not take notice of the

(*h*) *Hartley v. Herring*, 8 T. R. 130.

discipline of a dissenting body, even for the purpose of enabling the plaintiff to go into evidence of the amount of damage sustained by him.—In a recent case the same doctrine was recognised and carried out with even greater strictness (*h*).—This was an action of libel, in which the plaintiff, a Roman Catholic priest, had obtained a verdict at the Liverpool Assizes against the defendant, a clergyman of the Established Church. The declaration,—after setting out a written statement read by the defendant at a public meeting, imputing gross priestcraft or superstition to the plaintiff,—alleged that the publication was made “for the purpose of bringing the plaintiff into discredit, and to diminish the respect which he already enjoyed, and of vexing, harassing, and oppressing him in his character as a Catholic priest, and lowering him in the estimation of society at large, and of his own friends, and of impeding him in the performance of his duty as a Catholic priest.” But there was no averment or allegation that the act imputed to the plaintiff would, in fact, have exposed him to suspension or censure from his ecclesiastical superiors. At the trial, however, this was distinctly proved to be the law of the Roman Catholic Church by two witnesses, a bishop and a priest of that religion; and no objection was raised on the part of the defendant to the reception of their evidence, although it applied to a fact not directly put in issue. Two motions having been made, founded upon this defect,—the one for arrest of judgment, and the other for a new trial,—the Court of Queen’s Bench granted the former. Lord Denman, C. J. “We are not informed by the declaration, and of course can take no judicial notice, of the manner in which the plaintiff’s reputation might suffer by obloquy said to be cast upon him; being ignorant what conduct a Roman Catholic priest ought to pursue in similar circumstances. It is contended this defect was cured by the evidence

(*h*) *Hearne v. Stowell*, Queen’s Bench. Sittings after Mich. Term, 1841.

produced on the trial; that such conduct as is imputed to the plaintiff might be considered by his superiors to be highly indiscreet, and expose him to their censures, and even endanger his station in the church; but to that it was properly answered that no evidence can cure such a defect as this, as the issue joined had no relation to it. . . . The words composing the libel may naturally convey that meaning, and even the most innocent words may have been used and understood with that intent, and in that sense; but, in such case, the facts and circumstances which give the sting to a publication apparently innocuous ought to be brought to our notice. . . . The defendant at the trial sought an acquittal from the charge of reading a libel upon the *bonâ fide* nature of the remarks made upon the Roman Catholic priesthood, and, indeed, insinuated that they were founded in fact; nor did the defendant's counsel object to the reception of evidence, which, it is now truly observed, applied to no fact that was put in issue. We do not think it is open to him therefore to move for a new trial upon that point. The rule must be made absolute for arresting the judgment."

Before we quit this subject, another case as to judicial notice may as well be mentioned. In proceedings *ad pœnam* in the Ecclesiastical Court,—where the whole question turned upon the doctrinal sense to be given to a certain inscription, which followed the Douay version of the Bible, and agreed with it also in its division of chapters and verses, but differed in both respects from that of King James I.,—yet because it did not appear upon the record that it was taken from that version, the court refused to presume the fact. "It should have been specifically pleaded, for the court has no judicial information of the existence of Roman Catholic Bibles" (i).

The strictness which the common law evinces in pushing thus far a rule of the most technical character

(i) *Brecks v. Woolfrey*, 1 Curteis, 902.

is eminently contrasted with the more liberal course pursued by courts of equity. It is there that matters connected with the administration of charities may be most conveniently disposed of; and of late years recourse has been very seldom had to courts of law. Even the writ of mandamus has become in a manner obsolete. Some ground must be laid for that: but if no such ground exists, yet relief will be given in equity (*k*). The ground on which a court of equity will lend its aid in settling disputes of this nature has been thus stated by Lord Eldon (*l*). "This court has nothing to do with the voluntary subscriptions which may be paid to-day, and withheld to-morrow. Its jurisdiction is founded only on its right to declare the trust of the chapel, and how the chapel is to be used. The trust of the chapel is, however, connected with the consideration of the exercise of a spiritual jurisdiction; and the property being for the use of a *Scotch* congregation, we are led to the inquiry how the ministers of such congregations are usually appointed." The facility with which such an inquiry may be conducted in the master's office, gets rid of all the difficulty which has been raised at common law on the score of judicial notice. On the other hand, where the trust deed is silent as to the appointment of the minister, his duration in office, and as to any endowment to be made for him, and, in fact, specifies the congregation alone as the object of the trusts, the court will not interfere, nor enforce the particular discipline of the sect against the nomination or deprivation of a minister by the congregation. "It is very reasonable that a minister, who depends entirely upon voluntary contributions, should be dismissible at will by the persons so voluntarily contributing" (*m*). If these had been the trustees themselves, and not the congregation, it is apprehended that the former, and not the latter, would have had the

(*k*) 3 Ves. & B. 155.

(*m*) *Porter v. Clerke*, 2 Sim. 523.

(*l*) 2 Russ. 119.

right to dismiss at will the minister so maintained by them.

With respect to the doctrines or personal character of individuals, it is well established that the Court of Chancery has jurisdiction in disputed questions as to the appointments to, or removals from, spiritual offices, and that it will exercise it. An injunction, indeed, will not be granted to restrain a minister from the use of his pulpit until the hearing of the cause; unless some objection be made upon one or other of those two grounds, his doctrine or his character (*n*). Thus it may happen that the temporal court may be appealed to in certain cases, so as to control the decisions of the ecclesiastical authorities that regulate Roman Catholic congregations in England, in dogma no less than in discipline. It may even happen that the court may be called upon to compel the inculcation of Roman Catholic doctrines, even where a majority among the members of the congregation or the trustees have in the course of events become protestant, and to restrain them from devoting their chapel to their new doctrines (*o*). For though the court, as Lord Eldon has well observed, does not take notice of religious opinions, with a view to decide whether they are right or wrong, it may notice them as facts pointing out the ownership of property. "If property were given in trust for A., B., C., &c., forming a congregation for religious worship,—if the instrument provided for the case of a schism,—then the court would act upon it. But if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestuis que trust*, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorised him to say

(*n*) *Leslie v. Birnie*, 2 Russ. 119. p. 309; *Craigdallie v. Aikman*, 1

(*o*) *Att. Gen. v. Pearson*, 7 Sim. Dow. Parl. Ca. 1.
306, and the case cited in *notis*,

that the court would enforce such a trust, not for those who adhered to the original principles of the society, but merely with a reference to the majority" (*p*). And his lordship afterwards adverted to this case, as having settled the law to the above effect (*q*). In later cases the same rule has been acted on, and may now be considered established. In *Milligan v. Mitchell* (*r*) it was said by Lord Cottenham, that the only questions he had to consider on the state of facts before him were, 1st, Whether the property in litigation was held upon the charitable trusts alleged in the bill;—2nd, Whether there had been a breach of those trusts;—and 3rd, Whether the proper parties had been made plaintiffs. The plaintiffs were pewholders, entitled as such to be trustees of the chapel; they were held entitled to the decree they asked; and the party in whom the legal estate was vested, was compelled to perform the trust originally created for the exclusive benefit of members of the Scottish Kirk. It appeared that the congregation had authority to make new laws and alter old ones, and the object of the authority was expressed to be "for preventing feuds and controversies, and preserving order and unanimity in the Scots Presbyterian Church or Kirk at ——" But Lord Cottenham thought it might be safely assumed that this power did not extend to altering the fundamental principles upon which the association was formed, and destroying the trusts upon which the property was held; but only to altering the laws or making new laws, so far as might be consistent with such principles and trusts. In a much more recent case (*s*), where four fifths of a presbyterian congregation, together with their minister, left the united associate presbytery, which was governed by a presbytery and synod, and joined themselves to another presbytery, holding the same religious doctrines,

(*p*) 1 Dow. Parl. Ca. 16.

(*q*) 2 Mer. 247.

(*r*) 3 M. & Cr. 77.

(*s*) *Broom v. Summers*, before the Vice Chancellor of England, 5 Jur. 240.

but governed by no synod, Sir Lancelot Shadwell refused an injunction to restrain the trustees from ejecting the minister; on the ground that those seceding no longer formed the congregation for whom the trust had been created.

In all the cases hitherto discussed, the congregation possessed more or less of recognised authority over its ministers in spiritual matters. The difficulty did not arise of a minister being deprived by his spiritual superior in opposition to the will of the major part of the congregation. Yet we have considered one presenting a certain analogy with it; *viz.* the case of a minister excluded by the trustees, after having been duly appointed by the congregation. There, the merits of the case having been considered by the court, the arbitrary exercise by the trustees of their discretion was controlled, and the admittance of the minister directed. But, even in that instance, it is very difficult to determine how much importance Lord Mansfield attributed to the right of control, vested in the congregation by their peculiar discipline, and how much to the general relation of pastor and flock. There is no doubt that, so far as the question of direct authority is concerned, the cases that have been cited apply as strongly to the peculiar discipline of the Church of Rome, as they do to that of any sect of dissenters. In the Church of Rome the congregation possesses no spiritual power whatever. But would it, as such, have the right to apply to the court to restore a minister improperly or hastily refused or superseded by his superior, where the chapel is vested in that superior; or where, if vested in other trustees, such trustees refuse to concur in the application? Unless the chapel be left without a minister, competent to discharge his functions,—or generally in the absence of some other circumstance indicative of fraud or gross neglect,—it is apprehended that no application of that nature would be entertained by the court. But in any case the deprived or rejected minister may make the application either to the visitor of the charity or the court.

The visitor of a private foundation, is the founder himself or his heir; it is their common law right (*t*), which can only be defeated by the terms of the foundation itself (*u*). It is an appointment of law; as the founder is the author of the charity, the law gives him and his heirs a visitatorial power, to inspect the actions and regulate the behaviour of the members. But if the charity be vested in trustees, for those persons, no visitatorial power is implied in the founder or his heirs. The trustees have it, subject to their general accountability to the court (*x*). And when the court has been called upon for any reason whatever to administer the charity, for a similar reason no right of visitorship arises by implication; nor has the heir any authority to inspect or control in any way the proceedings of those approved of by the court for the management of the charity, unless the court gives it him (*y*).

Connected closely with this matter, is the question of patronage or nomination. It is now admitted on all hands that, in general, this right belongs to the founder of the charity and his heirs, with or without the concurrent right of visitation. It is, of course, competent to a founder to reserve it to whom he will; but if no reservation have been made, it will be taken to be vested in himself and his heirs after him. In one case it was so decreed, although other persons had for upwards of sixty years enjoyed the nomination (*z*). Upon failure of heirs of the founder, this right vests in the crown, which will exercise it in such a way as best to accomplish the intentions of the founder. If it be the founder's desire, that the ecclesiastical authorities for the time being shall nominate, trustees must be interposed for that purpose. Otherwise, the right will descend to the heirs of the founder after

(*t*) Skin. 481.

(*u*) Per Lord Holt, 2 T. R. 352.

(*x*) 1 Ves. 472.

(*y*) *Cockburn v. Raphael*, cor. Lord

Lyndhurst, C., Lin. Inn, 24th of March, 1842.

(*z*) *Att. Gen. v. Rigby*, 3 P. W.

145.

the death of the person named by the founder or actually possessing, at the date of the foundation deed,—or (if by will) at the founder's death,—the ecclesiastical character in question (*a*). We have already seen, that the court will not recognise the hierarchical succession of the Roman Catholic Church in these realms (*b*). But it is apprehended, that in that case, the heir would be a trustee for such ecclesiastics; and upon filing their bills, the latter would be, from time to time, declared by the court to have the right of nomination. If the chapel has been purchased or built by common contribution of the congregation,—if no fixed revenue is provided by the trust-deed,—and it is equally silent as to the management of the charity, nomination of the minister, and appointment of trustees,—the heir of the surviving trustee has no right himself to nominate, unless he can show that the exclusive management had, in fact, been exercised by the trustees. The right of nomination will in this case devolve upon the congregation, to be exercised either through an election by the majority, “or, according to the nature of the institution, by any particular persons, in whom the majority understands itself for that purpose to repose their confidence, rendering their nomination effectual.” Lord Chancellor Eldon, in such a case, directed an inquiry accordingly before the master, and also as to the appointment of trustees (*c*). If such an inquiry were directed in the case of a Roman Catholic, there seems very strong reason to believe that the ecclesiastical superior would be deemed the person in whom the majority understands itself to have reposed confidence for the purpose of such nomination. In fact, it is difficult to conceive any case where the right could be taken to have devolved upon the congregation at large, or upon the communicants, as

(*a*) *Att. Gen. v. Gaunt*, 3 Swanst. B. 145.
148, note.

(*c*) *Davis v. Jenkins*, 1 V. & B.

(*b*) *Att. Gen. v. Power*, 1 Ball & 159.

in other denominations. Communicants have no special privilege in the Roman Catholic churches; and are, in no respect, distinguished from other members of the congregation. Nor would the court strain the point in their favour. To argue that the minister should be elected by them, "sounds very strong to the ear of an Englishman;" as was forcibly observed by Lord Eldon (*d*).

After the nomination has once taken effect, it seems that the courts, in the absence of conflicting provisions, will endeavour to construe the appointment as having been made during good behaviour, and not merely during pleasure. If there be no provision for the appointment of a minister however, or the minister's maintenance, in the trust-deed, we have already seen that the interpretation will be very different. But where this presumption of a revocable appointment does not exist, the court will incline in favour of a permanent one. Thus, in *The Attorney General v. Pearson* (*e*), it was remarked by Lord Eldon, that the Court of Chancery would endeavour to follow the policy of the Established Church whenever it was called upon to determine the duration of a dissenting minister's appointment. In dealing with that case, his lordship regretted the want of satisfactory information as to the principles upon which those congregations usually acted. Were it the plan established by a general usage among certain classes of dissenters to appoint their ministers for limited periods, or to make them removable at pleasure, the Lord Chancellor thought that the court would be bound, if called upon, to carry it into effect. But the court would not "be disposed to struggle hard in support of such a plan. The policy of the Established Church has been, by giving the minister an estate for life in his office, to render him (in a certain degree) independent of his congregation." The same policy, it is apprehended, exists in all episcopalian

(*d*) *Leslie v. Birnie*, 2 Russ. 119.

(*e*) 3 Mer. 403.

churches. So strongly, indeed, has this disposition of the courts in favour of life appointments been felt by the legislature, that a distinct provision has been introduced into a late enactment (4 & 5 Vict. c. 38, s. 15), for the purpose of depriving of the benefit of such an interpretation, any master or mistress of a charity school to be founded under that act.

Still, as against all parties but the court, the minister will be entitled to retain possession of his office, where the undue appointment of such minister is the matter in controversy. Pending the suit for the proper administration of the charity, it is the practice of the court, if they find a minister in possession,—and ministering in the way in which it was the meaning that he should,—preaching the doctrines that were intended,—to continue him in the mean time, whether he were duly appointed or not; for the first point is have the service performed. And the court will pay him his salary (*f*). Nor will the court grant an injunction before answer to restrain trustees of a chapel in litigation, from preventing ministers licensed by the proper ecclesiastical authority to officiate in such chapel,—or from allowing other ministers to officiate there,—where the objection is purely one of discipline:—as, for instance, where it is apprehended that the ministers so to be permitted, will not have been licensed by the proper ecclesiastical authorities. This will merely entitle the other side to an injunction to restrain them, in the mean time, from being appointed to the pastoral office itself (*g*).

We cannot more appropriately conclude this partial inquiry into the kind of redress afforded by temporal courts in matters affecting the religious usages of bodies not belonging to the Establishment, than by the impressive words of Lord Eldon (*h*). “What the court can do

(*f*) Per Lord Eldon, 2 Jac. & W. K. 446.

247.

(*h*) 2 Jac. & W. 246-8.

(*g*) *Milligan v. Mitchell*, 1 M. &

in such cases is very little. It is much to the credit of dissenters, that their affairs are not more frequently made the subjects of suits: when they have been, I have never known any good result from it." And in referring it to the master to inquire into the nature of the trusts in that individual case, his lordship again observed, "I am almost afraid I am doing what may subvert the peace of many religious societies, in showing the infirmities of the law on this subject."

CHAPTER X.

ROMAN CATHOLIC CHARITIES OUT OF ENGLAND.

THE 2 & 3 Will. IV. c. 115 was confined to Great Britain. The 17th section of the 31 Geo. III. c. 32, provided for the reservation of the whole law of superstitious or unlawful uses from the operation of that act, and especially that portion of it which related to the foundation, endowment, or establishment of "any school, academy, or college, by persons professing the Roman Catholic religion within these realms," or their actual dominions. This provision extended to all charitable dispositions, whether within the British empire, or beyond it. Between the passing of this act and the 10 Geo. IV. c. 7, therefore, there can be no doubt but that the former statutes against sending relief to foreign Roman Catholic establishments continued in full force (*i*). But for the reasons given in the last chapter, it is submitted that these are now no longer capable of being enforced, except as against disqualified Roman Catholics. There is certainly a greater difficulty in coming to such a conclusion in the case of express enactments, than there is where the illegality of the disposition was originally nothing more than a presumption occasioned by enactments which have since been repealed. Still the effect of the 10 Geo. IV. c. 7, being, as the author contends, to repeal the 17th section of the 31 Geo. III. c. 32, the combined effect of the two enactments, when read together, will be to bring these foreign endowments for education or other charitable purposes within the scope and meaning of the 4th section of the earlier statutes. Therefore the better opinion seems

(*i*) 27 Eliz. c. 2, s. 6; 3 Car. I. c. 2, *ante*, pp. 56—9.

to be that any Roman Catholic, who is qualified under the Relief Acts, may now lawfully bestow his bounty upon any foreign or colonial objects of charity, as he might have done had the penal enactments cited below never been passed. In this view of the matter a few practical observations on the extent to which the courts will go in furthering the intentions of a donor of this description, may not be without their utility.

Whenever a charity is to be established out of England, the Court of Chancery has no general jurisdiction to administer the fund. It contents itself with directing payment or transfer to be made to the trustees or instruments of the donor's benevolence, leaving them to the exercise of their own discretion under the control of the foreign courts. Thus (*k*) Lord Hardwicke directed the transfer to the nominees of the plaintiffs, upon the trusts of the will, of the sum of 3,500*l.*, South Sea stock, bequeathed to the plaintiffs for the maintenance of poor labourers in Edinburgh. His lordship was of opinion that he could not give any directions as to its distribution; that belonging to the Scottish courts. So too in *Emery v. Hill* (*l*), where the petition had not been served on the attorney-general nor any other party in the cause, Lord Gifford, M.R., ordered the transfer of 28,844*l.* 15*s.* 4*d.* Bank 3 per cent. to the treasurer of the Scottish Society for Propagating Christian Knowledge, to whom it had been bequeathed by the testator; and for the payment of all dividends then in court to the same officer. A similar order was made in the case of an Irish charity (*m*), by Sir John Leach, M.R. So too in *Minet v. Vulliamy* (*n*), stock producing 190*l.* long annuities, which was the subject of bequest to a charity in Switzerland, was transferred to the attornies of the officers of that charity by the Master of the Rolls' order, notwithstanding the re-

(*k*) *Provost, &c. of Edinburgh v. Aubery*, Ambl. 236 (by Blunt).

(*l*) 1 Russ. 117.

(*m*) *Collyer v. Burnett*, Tambl. 79.

(*n*) 1 Russ. 113, note.

commendation in the master's report that the income alone should be paid over; as it was the intention that the charity should be perpetual. In *Martin v. Paxton*, cited in *Emery v. Hill* (o), the Lord Chancellor ordered a fund bequeathed by the testator in India to a charity at Lyons, to be paid to two of the plaintiffs, attornies of their co-plaintiff the mayor of Lyons. Under Archbishop Tension's codicil, dated the 2nd of September, 1715, and a decree made in February, 1717, the Society for the Propagation of the Gospel in Foreign Parts became entitled to the sum of 1,000*l.*, to be applied by them in America upon a certain event which did not happen until 1824. The fund at this time amounted to considerably more than 10,000*l.* Upon a bill being filed by the society, it was insisted for the crown, that the court ought not to part with the fund, but settle a scheme for its administration. But Sir John S. Copley, M.R., ordered that the fund itself, although much larger than the testator intended them to administer, should be transferred to the society; as he had reposed his confidence in them.

But, in another case (p), the decree ordered that the money arising from the sale of a moiety of the testator's estate should be laid out in the purchase of 3 per cent. consols, in trust in the cause, and the dividends were to be paid to the minister and officers of the Scottish parish mentioned in the will, for the benefit of the charity designated by the testator. Why the decree was limited to the payment of dividends, and did not embrace the transfer of the fund, does not appear from the report of that case. But it is certain that this departure from the general rule did not proceed upon any intention to control the management of the charity. The Lord Chancellor, reversing so much of the decretal orders as directed the execution of a scheme approved by him for the management, remarked that "the gift was good, but that the sort of charity to

(o) 1 Russ. 116.

(p) *Att. Gen. v. Lepine*, 2 Swanst. 181; *S. C.* 1 Wils. 465.

be established would be a subject for the determination of the proper court in Scotland." There is no doubt, however, that so long as the fund itself was retained by the court, it continued to possess an indirect jurisdiction over the charity; which in its discretion it might or might not think fit to exercise. It was in this way that the right of jurisdiction arose in a case that very lately came before the Vice Chancellor of England (*q*).

This was a cause petition presented by the eldest son of the testator, Edward Raphael, alleging mal-administration of a foreign charity founded under the testator's will, and praying an account of the fund, the settlement of a new scheme, and the future administration of the charity in this country. The testator, an Armenian merchant at Madras, by his will, in 1791, bequeathed the interest of a certain fund to be applied in the first place to the accomplishment of a literary purpose, and afterwards he directed that the whole of the interest arising from the said fund should be applied for the fund of a school for poor Armenian boys in such number as might be sufficient, but so that the boys and their masters could live decently; and that the Reverend Nicholas Pusani should be appointed as the director and manager of the said works and school for all his lifetime, and should be at liberty to appoint his successors to do and perform the said disposition. In 1792 Pusani executed a notarial act by his description of monk of the convent of S. Lazarus at Venice, whereby he appointed the abbot-general of that convent and his successors, the directors and managers of the charity and depositories of the fund. In 1825 this suit was instituted in England by the surviving executor of the testator for the administration of the charity, and the usual reference was made to the master as to the nature of the fund and how it was to be paid. The petitioner was the only person who attended the

(*q*) *Cockburn v. Raphael*. Before MS. Case; now on appeal before the Sir L. Shadwell, Hilary Term, 1842, Lord Chancellor.

inquiry, and at his suggestion the master made his report certifying his opinion that the charity should be founded at Venice, but that the fund should remain invested here in the name of the accountant general, and the dividends paid from time to time to the abbot of S. Lazarus for founding and supporting the charity. The court confirmed this report, and directed the interest to be paid to the then present abbot of S. Lazarus, and, after his decease, to the abbot of the said convent for the time being for ever, upon trust for founding and supporting the charity according to the trusts of the testator's will; and all parties were to be at liberty to apply to the court concerning the charity or the charity fund. Upon the merits disclosed by the affidavit of the Archbishop of Surini, abbot-resident at the convent of S. Lazarus, the Vice-Chancellor dismissed with costs the petition as officious and unwarrantable. But his honour considered that the decree already pronounced by him made it useless to discuss the question of jurisdiction in general. The court had made certain specific directions upon the master's report. It is true that that decree appears to have been in a manner taken by consent, and founded upon a report embodying the *ex parte* suggestions of the petitioner, so that, virtually, he himself framed the report. But his honour is said to have observed, that as no petition of rehearing had been presented against that decree, he was as much bound by it, (though it was pronounced by himself,) as he should be by a decree of the Lord Chancellor. However, his honour considered that upon a great change of circumstances, such as the destruction of the convent, a foreign conquest of Venice, or the like,—or upon gross and hopeless mismanagement being made out,—the court would interfere and alter the present scheme; if the application were made in a proper manner; but not, as it seems, by petition. So too, in *The Attorney General v. The Mayor of London* (r), the executors had agreed to pur-

(r) 3 Br. C. C. 171.

chase, under the approbation of the Court of Chancery, certain real estates in Yorkshire out of the residue of personal estate bequeathed to them "for such charitable and pious uses as they in their discretion should think fit." They then appropriated the rents and profits for ever to be applied on certain charitable trusts in North America, which were approved of by the court. The trust estate continued to remain within the jurisdiction of the court. The trusts failing for want of objects, a scheme was entertained for their new appointment, and the administration was entrusted to other hands. Upon these grounds, this case is very capable of being supported, notwithstanding what was lately said of it by the Court of Privy Council (*s*).

The Court of Chancery will also interpose where there appear to be no instruments of the founder's benevolence; or where he has named such by an official description, and there is no such office; or where there has been such, but it has ceased to exist. For the first object of the court is to provide a trustee;—and not to part with the trust fund until is satisfied that there is a party to account for the management, either to its own or some other jurisdiction. Thus where a testator bequeathed stock in the funds to the British consul-general and treasurer of the British Contribution Fund in Lisbon, upon certain trusts, for the benefit of widows and orphans in Portugal; but, between the date of the will and his death, the British Contribution Fund was abolished by act of parliament, and the office of treasurer consequently ceased (*t*); the Master of the Rolls refused to settle a scheme for the future administration of the charity, as the charitable bequest was in no way affected by the non-existence of the office in question. But his honour said that the failure of a trustee would be supplied by the court, and he therefore referred it to the master to

(*s*) 1 Moore, 296.

(*t*) *Att. Gen. v. Stephens*, 3 M. & K. 347.

approve of a proper person to be trustee jointly with the relator.

Thus where a testator devised considerable property in India for charitable purposes, and among others for the establishment of a college in the territories of the King of Oude, but named no persons in that state to carry the trust into effect, and it did not distinctly appear upon the master's report, or in the appended correspondence, that the British resident there, or the governor-general of India, had the means of giving effect to the bequest, but only that the latter was willing to receive the funds (*u*); it was resolved, on appeal from the supreme court of Calcutta, by the judicial committee of the privy council, that further inquiry should be made as to the power of the governor-general to aid trustees to be appointed by the supreme court for the purpose; and if the court were satisfied that in that or any other way such trustees could give it effect, then the fund was to be paid over to them, and to be administered by them under the direction of the court. It was observed by Lord Brougham, that, although Oude possibly might be an independent state, the court could not shut its eyes to the weight the Indian government had with the court of Lucknow: and that it could hardly be said that the authorities there were wholly on the footing of a foreign and unconnected state. "The jurisdiction of the supreme court, moreover, extends over all British subjects residing within the limits of the charter, whether in the British or native dominions: and this affords facilities for the due execution of the charity under the court's superintendence, which could not exist in any of the cases cited" (*x*).

On the same principle the court will interpose, where there is a trust for a charity that is manifestly intended to be established abroad, but no particular locality has

(*u*) *Mayor of Lyons v. East India Company*, 1 Moore, 272.

(*x*) *Ibid.* p. 298.

been pointed out. In selecting a place for the establishment and management of such a charity, regard will be had not only to situation, jurisdiction of a competent court, and general convenience; but, besides all these, to the probable wishes of the founder. Thus in the case of *Cockburn v. Raphael* (y), already cited, there being no direction in the will as to where the proposed Armenian college was to be established, the court confirmed the master's report, and directed it to be established at Venice. It appeared from the report that there were far greater facilities for conducting it at Venice than at Constantinople or in Armenia. There was already a famous convent of learned Armenians at Venice, and constant opportunities were afforded for bringing over youths of that nation from Constantinople to that port. The testator, though himself an Armenian, had nominated the Father Pusani, a Venetian Lazarist, residing at Venice at the date of his will, to be his trustee, with power to appoint his own successors: and on that power the father had acted so long back as 1792, by nominating the abbot-general of his convent, and his successors, to be the trustees of the charity. Under these circumstances the decree was pronounced, confirming the master's report, and directing certain specific things to be done, which were founded upon it. The court laid great stress on the presumed intentions of the testator, as evidenced by the appointment of Pusani. His honour was of opinion that the nomination of that gentleman, who was at the time a monk of the convent of S. Lazarus at Venice, was a sufficient intimation of the testator's intention as to where the charity should be established.

The question as to the extent to which the court will go in controlling the administration of a foreign charity, where doubts may arise—1st, As to who are the persons in whom the trust and confidence of the founder appear

(y) Before Sir L. Shadwell, V. C. *Ante*, p. 159.
of England, Hilary Term, 1842.

to have been reposed; and, 2ndly, As to the competence of the foreign tribunal to control or prevent a mal-administration of the funds,—has been raised in a recent case (z). By his will, dated London, July 21st, 1835, Robert Mitford willed, devised, and bequeathed the remainder of his property, of whatsoever kind and description, that might arise from the sale of his effects, (after deducting the annual amount that would be requisite for a certain purpose,) “to the government of Bengal, to the express purpose of that government applying the amount to charitable, beneficial, and public works in the city of Dacca in Bengal; the intent of such bequest and direction being that the amount should be applied exclusively to the benefit of the native inhabitants in the manner they and the government might regard to be most conducive to that end.” There was a like provision as to two annuities after lapse. It appeared from the letters patent establishing the supreme court of Calcutta, that that court had the means of controlling the administration of the charity even in the hands of the government of Bengal, by process of sequestration. It also appeared that there was a master of the supreme court, whose duties were analogous to those of the masters in Chancery. The Vice Chancellor of England decided that the bequest was not void for uncertainty, thus establishing the charity as against the next of kin. It appears, however, that his honour gave no direction for transferring more than the dividends of the trust fund. An appeal was made from this decision, which has been argued before Lord Cottenham, C., and again before Lord Chancellor Lyndhurst, in Michaelmas Term, 1841. It now waits for judgment.

Illegal Gifts to Foreign Charities.

It will not be out of place to refer the reader to what

(z) *Mitford v. Reynolds*. Before 1838, 2 Jurist, 886. Now on appeal Sir L. Shadwell, V. C., 25th of July, to the Lord Chancellor.

has been already said concerning the illegality of domestic charities of a certain description, and of the *cy-pres* application of the fund by the court. In respect of gifts to foreign charities, the old law is still capable of being enforced where the donors or donees are not qualified subjects of relief within the meaning of the Relief Acts (a). The 2 & 3 Will. IV. c. 115, which is in terms confined to charities within Great Britain, merely places such charities on the same footing with those of dissenters, "and not further or otherwise." No dissenting charities but such as are duly qualified both in respect of their foundations and of the persons concerned in them, are warranted under their own Toleration Acts. Neither the Catholic Relief Acts, nor the Catholic Charities Act, have a wider operation than what has been given to the acts for the toleration of dissenters. Beyond that operation, the ancient law touching donations made by Roman Catholics within the realm, and certain of its dominions in favour of foreign charities, such as it has been laid down by Duke, and assented to by the courts in several modern cases, still obtains in all its force. Thus much, at least, is certain. But unless the cases of *West v. Shuttleworth*, and *The Attorney General v. Todd*, have been erroneously decided, it is impossible to support the legality of gifts by donors here to Roman Catholic charities in any foreign countries, not being parcel of the queen's dominions. If the Relief Acts have not removed the disability, even from qualified Roman Catholic subjects, it is certain that the Charities Act has not, for it was confined to Great Britain. If those decisions, therefore, are now law, all such foreign charities are still within the rule of *De Garcin v. Lawson* (b). There the testatrix had given legacies to foreign Roman Catholic establishments as well as domestic, among which were the English Black Nuns at Paris, the Benedictine Monks at Cambray, and the English Benedictine Monks of a place in Lorraine.

(a) *Vide ante*, p. 131.

(b) 4 Ves. 433, note.

Lord Rosslyn held that all the legacies were void, and declared that those in particular to foreign establishments must be taken to be contrary to the policy of this country. By the French Conventions Act (59 Geo. III. c. 31), commissioners of liquidation were empowered to distribute certain funds raised by the French government for liquidating claims by British subjects, in respect of moveable or immoveable property confiscated illegally by the French authorities, at the beginning of the revolutionary war. A claim was made in 1825 under this act by the Rev. Mr. Daniel, in respect of the Roman Catholic seminary at Douay, which had been exempted as British property from the decrees of the Convention for the confiscation of ecclesiastical property as such, and had, afterwards, on the breaking out of the war, been confiscated by the same Convention under the general decree then published in respect of property owned in France by British subjects. The commissioners allowed the claim, but declared the crown entitled; and Lord Gifford, on appeal to the privy council, affirmed their decision, on grounds of public and religious policy (c).

(c) Claims of the Rev. Mr. Daniel, 1825. Printed Paper.

CHAPTER XI.

COLONIES AND PLANTATIONS.

THE obligatory force of every law is confined to the country in which it is established (*d*). But the subjects of that country on whom it has once attached, cannot release themselves of all their obligation to it by a change of their domicile. All that is strictly local, strictly municipal, will, indeed, have ceased for them. But they carry with them their natural duty of allegiance, and their natural right to protection from their sovereign. These cannot be forfeited, cancelled, or altered by any change of time, place or circumstance, nor by anything but the united concurrence of the legislature. As the prince is always under a constant tie to protect his natural born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent (*e*). All the general rules of common law, therefore, for the protection of the subject in his person and his property, accompany him wherever he goes. If an uninhabited country be occupied, and planted by English subjects, the common rules of inheritance and succession, and in fine all those general laws, which are best described as the birthright of Englishmen, are immediately there in force. Whatever in the English law is applicable to their situation and that of their infant colony, they must be considered as having carried thither with themselves (*f*). But the artificial refinements and distinctions incident to the property of a great and commercial peo-

(*d*) 1 Burge, Comm. p. 25.

(*f*) Salk. 411, 666; 2 Cox's P.

(*e*) 2 Cox's P. Wms. 124; 1 Bl. Wms. 75.
Comm. 376.

ple, the laws of police and revenue, such especially as are enforced by penalties, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force (*g*). In conquered or ceded territories, the rule is very different. There the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But until such laws are given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these enact any thing that is *malum in se*,—or are silent; for in all such cases the laws of the conquering country shall prevail (*h*). And upon either of these cases arising, it is apprehended that the rule as to the applicability of English law will be the same as in the case of a colony by plantation; and that only so much of it as may be adapted to the circumstances of the conquered or ceded territory, and its inhabitants, will be construed to extend to it and them. Another distinction has been attempted to be introduced. It has been said (*i*), that there is a diversity between the conquest of a kingdom of a Christian king, and the conquest of a kingdom of an infidel; for that in the latter case, if the conqueror be Christian, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and nature contained in the Decalogue. In such cases, it is added, until the establishment of more certain laws among them, the king and his judges shall judge them and their causes according to natural equity, in such sort as in ancient time before municipal laws were given. Without hazarding any conjecture as to the practical difference between natural equity so understood and common law, it is doubtful whether this position can

(*g*) 1 Bl. Comm. 124.

and see 2 Cox's P. Wms. 75; Show.

(*h*) 2 Cox's P. Wms. 75.

P. C. 31.

(*i*) *Calvin's case*, 7 Rep. 17, b.,

be supported to any extent. In *Campbell v. Hall* (*k*), it was said by Lord Mansfield, that the exception as to pagans in *Calvin's* case was absurd, and only showed the universality and antiquity of the maxim, that the laws of a conquered country continue in force until they are altered by the conqueror. For that distinction could not exist before the Christian era, and in all probability arose from the enthusiasm of the crusades. These expressions of Lord Mansfield were referred to by Lord Brougham with approbation, or at least with respect, in a recent case decided by the judicial committee of the privy council (*l*). The better opinion, therefore, would seem to be, that there are but the two limitations already mentioned of the rule that the laws of even an infidel country, after conquest, will prevail, unless otherwise provided by the conqueror. Those limitations are, that where they command what is *malum in se*, or where they are silent, the natural equity of Lord Coke, which is the common law of the conquering country, will prevail: subject, however, to the qualification already quoted from Blackstone, as to so much of it as shall not be applicable to the conquered country or its inhabitants. Whatever may be the distinctions between the two classes of colonies on other points, it is clear that there is none in this. Whether the colony be one of plantation, or one of cession or conquest, the general rules of English law, and only such of these as are applicable to the colony, and not merely to the mother country, are in force within it (*m*).

It is not difficult to make the application of these principles to the English laws affecting Roman Catholics. They are laws of police, for the most part enforced by penalties. They are founded upon a policy that is peculiar to the country in which they had their birth. They apply to a state of society, much of which has disappeared from the soil of that country, and of which nothing whatever

(*k*) Cowp. 208.

(*m*) 1 Moore, Pr. C. C. 175.

(*l*) 1 Moore, 273.

is discoverable among our conquered or our planted colonies. They were, above all, designed for the promotion and security of the Established Church, and in aid of its spiritual jurisdiction. Of the laws that were passed for the direct attainment of the same end, not one, as we have seen, is either necessary or convenient for the colonies, and therefore is not in force there, unless especially extended by statute. Like the various Mortmain Acts, the penal laws against Roman Catholics are, in the words of Sir William Grant (*n*), “wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred into the code of any other country.” And there is a reason for this. The privileges belonging to the Church of England, as by law at present established, were certainly conferred by various statutes passed immediately after the change of religion in the 16th century. Now, with respect to privileges, the tenor of the grant is to be strictly observed. They are derogatory to common law, and ought to be very strictly interpreted; for laws that derogate to common law have been styled disabling laws by jurists. Besides, the establishment of a church, and not its particular doctrine, is that which renders it parcel of the constitution. Now the acts by which the Church of England has been established, come evidently within the already cited language of Blackstone, as laws for the maintenance of the clergy. They may be even classed among revenue laws also, for tithes and rates are alike taxes; the former are called real taxes, the latter personal. But whether we consider the laws of England against Roman Catholics as laws of police, of territorial policy, or of ecclesiastical discipline, the principle by which to judge them is much the same. In any view of the question they are municipal laws passed or adopted *in invitum* as respects their matter or object, and in open derogation to the common law of

(*n*) *Att. Gen. v. Stewart*, 2 Mer. 163.

Blackstone and the natural equity of Coke. Now the rule is certain enough, as Suarez puts it, that all laws invading, derogating to, or qualifying common law, and all laws conferring privileges, are odious and disabling, and to be jealously confined in the interpretation. If they express any determinate place, they are only valid, he says, for that place;—if they refer to any determinate matter, they enable only in respect of that matter (*o*).

Whenever, for any of the above reasons, a statute is become inapplicable to the colonies, the common law, as it was before the statute passed, immediately revives, and is in force there. This rule was recognised by Lord Mansfield as applied to the case of an attempt to bribe a privy councillor to procure an office in Jamaica (*p*). After noticing the statutes of 12 Rich. II. c. 2, and 5 & 6 Edw. VI. c. 16, his lordship observed that they did not extend to Jamaica, although enacted before its annexation to the crown. “If Jamaica was considered as a conquest, they would retain their old laws, till the conqueror had thought fit to alter them. If it is considered as a colony, (which it ought to be, the old inhabitants having left the island,) then these statutes are positive regulations of police, not adapted to the circumstances of a new colony; and, therefore, no part of that law of England which every colony, from necessity, is supposed to carry with them at their first plantation. . . . So that it turns upon the common law.” And, as there was no doubt that it was also an offence at common law, the rule for a criminal information was made absolute. The converse of this rule was recognised in the famous case of the slave *Somerset* (*q*). The British legislature had, by numerous enactments, encouraged the African slave trade, and sanctioned slavery in the colonies. But the Court of Queen’s Bench declared the principle to be, that the

(*o*) De Legibus, lib. v. cap. 3,
s. 1, 15; lib. viij. cap. 13, s. 1; cap.
22, s. 14; cap. 26, s. 3.

(*p*) *Rex v. Vaughan*, 4 Burr.
2500.

(*q*) 20 St. Tr. 71.

status of slavery was, nevertheless, “a municipal relation;—an institution, therefore, confined to certain places, and necessarily dropped by passage into a country, where such municipal relation did not subsist. The negro, making choice of his habitation in England, had subjected himself to the penalties, and was therefore entitled to the protection of its laws.” And in another case it was said that (*r*), “the law of slavery is a law *in invitum*.” “When they [the slaves] got out of the territory where they became slaves to the plaintiff, and out of his power and control, they were, by the general law of nature, made free.” The status of slavery was the creature of municipal regulation, and could not exist in a country where that regulation was not in force, although recognised by the laws of that country within certain limits. But the rule is capable of a wider application. In general, personal disqualifications, not arising from the law of nature, but merely from the principles of municipal law, and especially such as are enforced by penalties, do not obtain beyond the territory where they were first imposed. Hence, says a learned author of the present day, the disqualifications resulting from heresy, excommunication, popish recusancy, infamy, and other penal disabilities, are not enforced in any other country except that in which they originate. They are strictly territorial. So, the state of slavery will not be recognised in any country, whose institutions and policy prohibit slavery (*s*). The modes of regarding the question may be various, but the principle they illustrate is one and the same. It rests on grounds which are quite indisputable. Applied to the subject-matter of the present treatise, the conclusion is simply this. Colonies, although parts of the dominions of the crown, are not parts of the realm (*t*). Therefore the various penal laws enacted against Roman Catholics within this realm, unless expressly extended to

(*r*) 2 B. & Cr. 463.

4, s. 104; Co. Litt. 79, b., note 44.

(*s*) Story's Conflict of Laws, ch.

(*t*) 3 Inst. 11, 111; 4 Inst. 124.

all the dominions of the crown, had no effect beyond the realm itself. The legislature of the mother country continued, indeed, in possession of the habitual sovereignty over those dominions, but in the absence of a particular and distinct provision in that behalf, none of the measures concerning police, revenue, or religion, nor indeed any other municipal relations enacted by it, were actually in force in our transmarine possessions. Those enactments, of course, which were expressed to extend to the general dominions of the crown, took effect accordingly. But enactments of this kind are comparatively few. And it is equally clear upon principle, that even where the heirs and successors of the actual monarch were mentioned, which was of still rarer occurrence, the test of non-applicability, already mentioned, would be a most effectual bar to the operation of the acts in question, as to colonies planted or conquered subsequently to the passing of them. They should be invariably read as though they were in terms confined to the "actual dominions" of the crown at the respective periods of their enactment. But it was perfectly competent for the local legislature in each colony to extend to it, under the sovereign control of the imperial parliament, all or any of the acts of that body, or to impose new or additional severities. But with the qualifications that have been stated, still the principle is this;—the laws of England, which declared popery an illegal religion, and the profession of popery a crime, the penalties which enforced those laws, and the presumptions to which their policy gave birth, were purely the creatures of municipal regulation, and in their causes, objects, and circumstances, purely territorial, and devoid of all authority or capability of enforcement beyond the territory for which they were designed, and within which they were enacted.

It may be objected against the view here taken of the penal laws affecting Roman Catholics, that it has been frequently held that they are to be extended, not confined, upon the principle that *summa est lex quæ pro reli-*

gione facit, and that laws intended for the promotion of public policy, are to be accounted remedial laws, although enforced by penalties. But to this it must be answered, that the decisions in question, which have received their notice in the proper division of this treatise, proceeded upon circumstances that had their growth within the realm, and not its transmarine dependencies. It is perfectly consistent with those decisions to maintain, that the same laws, which in England deserved to be accounted remedial, deserved to be ranked with penal laws in the possessions of the crown lying out of England. The public policy which made them remedial in the realm had no existence, as we have seen, in the plantations. Deprived of this support, the essential character of these laws—their penal character—prevailed over all considerations of a purely local, territorial, and British origin ; and tried by the unerring test which the authorities already quoted have consigned to us, it is impossible to pronounce in favour of the inherent applicability of such laws to the transmarine dominions of the British crown. The common law alone must be left to determine the Roman Catholic status in those distant possessions. And the common law contains none of those disabilities. There never was “a single instance,” as Lord Mansfield most truly observed, “from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law. But bare nonconformity is no sin by the common law” (u).

The conclusions to which we have come, have been rather acquiesced in by the courts and the legislature,

(u) 2 Burn's Eccl. Law, 218.

than made the subjects of distinct and express decision or enactment. The colonies have been suffered to legislate upon these subjects after their own peculiar notions, without any exercise on the part of the crown or parliament of their undoubted right of control, and without its being pretended for a moment that in doing so they have intermeddled with the principles of the British constitution. When questions have arisen at Westminster, disclosing circumstances which, if occurring in England at the time when they occurred in the colonies of England, would have afforded an imperative ground for the severe interposition of the courts (*x*), it has been assumed on both sides, and not disagreed to by the bench, that a change of locality, and an alteration in the law, were so far identical with one another, that colonial transactions of a Roman Catholic character, to whatever other objections they might be exposed, were not open to that one at least which affected all transactions of the same character when they occurred in England; *viz.* their general illegality within the popery laws. So early as the reign of James the First, we find that this doctrine had presented itself to the notice of the courts. It was remarked by Sir Edward Coke, in *Rex v. Winter and others* (*y*), that "it is now questioned and doubted whether the law of recusants and reconciled persons do hold for Ireland also and the parts beyond the seas: that is, whether such as were there reconciled [to the see of Rome] be within the compass of the statute or not."

In a late case it appeared that the testator was a French officer domiciled in British India, where he died in 1801. By his will, dated on the 1st of January in that year, he gave several charitable bequests, and amongst others one "to the relief of the poor of Chandernagore, and to be managed by the head of the French church, either curate, priest, or other; also to be delivered to

(*x*) *De Garcin v. Lawson*, 4 Ves. claim, *ante*, p. 166.
433, note; and the Rev. Mr. Daniel's (*y*) 2 How. St. Tr. 179.

the poor daily, at a fixed hour, at or near the gate of the church of Chandernagore." He directed that there should be a carved stone on the wall of that church, with an inscription stating the amount of the bequest, and that it was the gift of "Major General Claude Martin, born at Lyons, aged . . . years, and died the . . . of . . . and is buried at . . . Pray for his soul." The four suits for having the charities established were all instituted between the years 1816 and 1819; so that, even supposing the 2 & 3 Will. IV. c. 115 applicable to any charities whatever out of Great Britain, it is clear that this bequest was not within it. It is also certain, that the directions about the inscription on the stone, and the management and locality of the charitable trusts, would have attracted the notice of the courts in England at that time, had they come before them in the case of an English charity. No observation, however, was made upon this point. In the course of the proceedings, the legacy was paid by one of the executors into the hands of the accountant-general, in trust in the information suit, and was to be applied according to the will of the testator. And upon the hearing of the appeal to the privy council, the same silence is remarkable. It seems to have been conceded as undoubted law, that the doctrine which formerly subsisted here as to the illegality of Catholic bequests, did not extend to India (z).

Thus, also, in the case of *Cockburn v. Raphael* (a), the testator, an Armenian merchant, was resident at Madras. His will was made in 1791, his death took place in the same year, and the suit for the administration of his charity was instituted in 1825. He appointed F. Pusani, at that time a monk of the convent of S. Lazarus at Venice to be the director and manager of the charity for his life, with powers to appoint his successors in perpetuity; and in exercise of this power the monk in the following year executed at Venice a notarial act,

(z) 1 Moore, 175.

(a) *Ante*, p. 162.

wherein he was described as a monk of that convent, by which he nominated his abbot-general and the successors of that prelate to be directors and managers in his stead. The charity was to be a school for poor Armenian boys. The Vice Chancellor of England established it, and confirmed the master's report in favour of the monks of S. Lazarus at Venice. Had this been an English bequest, it is very unlikely that his honour would have decided in the same way. The only Relief Act actually in force at the period of the institution of the suit was the 31 Geo. III. c. 32; and by the 17th section of that act, the law as to endowments by persons professing the Roman Catholic religion within this realm and its actual dominions was especially reserved from the general operation of it. Had the penal laws, enacted at an earlier period against dispositions in favour of domestic or foreign convents, colleges, or places of education, been applicable to similar dispositions by Roman Catholics resident within the dominions of Great Britain, but not within the British realm, it is perfectly clear that they were saved by the 17th section of the statute, and consequently that the court would never have established, far less have interposed to execute, such a bequest as the one then before it. It is therefore certain, that as far as Roman Catholic residents within the actual dominions of the realm were concerned, the reservation made by the 31 Geo. III. c. 32, s. 17, was quite inoperative and nugatory. It merely declared that they were not to have, by virtue of that act, a right which they possessed already, and independently of any enactment.

In a treatise so limited as the present, it would be absurd to attempt a compilation of the multitude of laws affecting Roman Catholics, that obtain in the various colonial and foreign possessions of this country. It is sufficient to be able to affirm that in all of them, whatever may be the local manner of its application, the principle which has been here laid down has been followed unhesitatingly. The inherent right of the Churches of

England and Scotland to an exclusive establishment has not been asserted, or, if asserted, it has been denied; and the establishment, when it has taken place at all, has been made to depend entirely upon the good pleasure of the local legislature. If the colonies have, at earlier periods than the present, seemed to guide their legislative proceedings in regard of Roman Catholics after those of the mother country, even where the latter had not been made to extend to the actual dominions of the crown generally, it can only be said that these colonies, having a discretion, preferred to exercise it in the way referred to. There was no obligation upon them. They were free to enact, and equally free to forbear to enact. But as to such of our colonies as have exercised the same discretion in an opposite spirit, we have, in the confirmation of their enactments by the sovereign in council, or even in the simple fact of their not being disallowed, a remarkable proof of the soundness of the principle laid down by the cited authorities, and its applicability in the manner here advanced. Among the latest instances where that principle has been the most clearly recognised and carried into the fullest effect, the two crown colonies of New South Wales and Van Diemen's Land may be particularly mentioned.

By the Acts for the Administration of Justice in New South Wales and Van Diemen's Land (*b*), the governors of those colonies, with the advice of their legislative councils appointed under the royal sign manual, are empowered to make such laws and ordinances for the peace, welfare, and good government of their respective colonies, as are not repugnant to those acts, or to any charter, letters patent, or order in council issued in pursuance thereof, or to the laws of England (*c*). And all laws and statutes in force within England at the passing of the 9 Geo. IV. c. 83, and not inconsistent with those

(*b*) 9 Geo. IV. c. 83, amended by 2 & 3 Vict. c. 70, and 3 & 4 Vict. c. 62, and continued by 4 & 5 Vict. c. 44. (*c*) Sects. 20, 21.

acts, or with any such charter, &c., shall be applied in the courts of those respective colonies, "so far as the same can be applied within the said colonies." The governors in council are respectively empowered to make declaratory or qualifying ordinances touching any English laws and statutes and their applicability; should a doubt arise respecting it. Until such ordinances are made, the supreme courts are invested with the authority to pronounce upon their applicability (*d*). This section is merely declaratory of the common law as to the application of English laws to dominions not being within the realm of England. Within six months from the date of every local law or ordinance, the governor of the colony where it has been enacted is to transmit it to one of the secretaries of state. In the meanwhile it takes effect within the colony from the period of its enrolment in the supreme court. If disallowed by the imperial government, it is null and void from the time of publication of the disallowance within the colony. If not disallowed within four years from its first enactment, it shall be valid and effectual, and have full force (*e*).

In exercise of the legislative powers conferred by the 9 Geo. IV. c. 83, the following among other measures have been adopted in New South Wales, and in Van Diemen's Land, by the local legislatures; and they are now in full force within those colonies respectively.

The New South Wales Act, 7 Will. IV. No. 3 (*f*), recites, that it is expedient for the advancement of the Christian religion, and the promotion of good morals in the colony of New South Wales, to encourage the observance of public worship, and for this purpose to authorise the issue from the revenue of the colony of sums to be applied in aid of the building of churches and chapels, and of the maintenance of ministers of religion.

(*d*) Sect. 24.

(*e*) Sects. 22, 28.

(*f*) An Act to promote the Building of Churches and Chapels, and to

provide for the Maintenance of Ministers of Religion in New South Wales. Passed 29th of July, 1836.

It then proceeds to regulate the issue of public moneys for these purposes, and to limit the amount, except in the extraordinary case of a vote of the legislative council. With that exception, the minimum to be issued towards the erection of any one church or chapel, with the minister's dwelling, is to be 300*l.*, the maximum is to be 1,000*l.* The issue of public money is made contingent on voluntary contributions to an equal amount being raised in every case. The highest stipend payable by government to any one officiating minister of religion, is to be 200*l.* a year, subject to increase by permission of the executive council; the lowest is to be 100*l.* a year. This scale is to be solely regulated by the number of adult persons subscribing the declaration required by the act; *viz.*: that they are of the religious denomination for whose use the church or chapel is intended. The salaries of existing ministers are saved from this act. The governor in executive council is empowered to make regulations for the better accomplishment of the purposes of the act.

Regulations were accordingly issued by the governor of New South Wales shortly afterwards. Applications for aid under the act must be made through, and explained and recommended by, "the Right Reverend the Lord Bishop of Australia, the Presbytery of the Church of Scotland, or the Right Reverend the Roman Catholic Bishop, on behalf of their respective churches"(g). Neither in the act itself, nor in the regulations made under it, is there the slightest preference shown to any one of these denominations. The numerical test is the only one admitted. This act not having been disallowed to this day, and the four years from its passing having long since elapsed, it has now full force within the 9 Geo. IV. c. 83, s. 28.

A still more decided application of the same principle is to be seen in the enactments which have been made by

(g) *Sydney Gazette*, 5th of Oct. 1836. Government order, headed "Religious Establishments."

the lieutenant-governor and legislative council of Van Diemen's Land, on the same subject of religious establishments. By the local act, 1 Vict. No. 16, which passed the legislative council on the 27th of November, 1837 (*h*), (and which was amended by another act of the same legislature, 4 Vict. No. 16, which was passed on the 21st of September, 1840,) it is recited, that it is expedient to make provision by law for the support, from the colonial public revenue, of certain ministers of the Christian religion, and for encouraging in the manner thereafter mentioned the erection of places of public worship, and of ministers' dwellings for persons professing that religion. It is therefore enacted, that upon certain conditions as to equal contribution and other conditions having been complied with by the applicants, the lieutenant-governor in executive council may, (unless he thinks the proposed erection an unnecessary one,) issue from the colonial treasury any sum of money not exceeding 1,000*l.*, nor less than 300*l.*, to be apportioned between the church and the ministers' dwelling in manner therein mentioned. The buildings are to be for ever dedicated to the purposes, and holden solely for the uses, and be appropriated to the service of the particular religious denomination for which they were originally erected. If within ten miles of any such place of worship intended for members of the Church of England, the Church of Scotland, or the Church of Rome, there shall be resident not less than 200—(if in the two principal towns, or 80 if elsewhere)—free, adult, and subscribing members of the denomination to which it belongs, the minister will receive 200*l.* a year from the colonial treasury; power being reserved to the lieutenant-governor in legislative council to vote other salaries in special cases not within the act. But no salary shall be issued to any minister

(*h*) An Act to make Provision for the Support of certain Ministers of the Christian Religion, and to promote the Erection of Places of Divine Worship.

not appointed in accordance with the laws and principles of his own denomination of Christians, or not confirmed by the sovereign or the lieutenant-governor. Nor shall any salary be continued to a minister, after it has been certified to the local government by the proper ecclesiastical authority, that he has been tried and found guilty by competent authority, according to the laws or usages of the church to which he belongs, of such particular instances of misconduct or culpable neglect, as, according to the same, renders such discontinuance of salary proper. Existing rights are saved from the operation of the act, by reference to the schedule annexed, where the churches and ministers, so exempted, are enumerated by their ecclesiastical titles and their localities, under the triple division of "Church of England, Church of Scotland, and Church of Rome." The four years having expired on the 27th of November, 1841, this act is now valid and effectual within the 28th section of the 9 Geo. IV. c. 83.

With such striking examples as these before us of the manner in which the applicability of the principles of the British constitution of church and state to our distant colonies has been construed both there and at home, it is somewhat remarkable, that a few years ago a very different opinion seems to have been entertained on the subject. The 10 Geo. IV. No. 5, (Local Act,) was passed by the legislative council of Van Diemen's Land on the 20th of January, 1830, for the mere purpose of extending to that colony the Roman Catholic Relief Act (10 Geo. IV. c. 7). The preamble recites the expediency of "preventing" (not *removing*) doubts as to the inherent applicability of the imperial enactment. It has been remarked by a learned author⁽ⁱ⁾, that this act merely brought into operation an act of the British legislature which would have had effect there without any such introduction. But this is not the true view to take of the mis-

(i) Clark's Colonial Law, 649.

apprehension of the local legislature. The real point to be considered is, that in that colony there was at no time any occasion for the introduction of such an enactment. Van Diemen's Land was colonised in 1804. It was not among the actual dominions belonging to the realm at the passing of such penal acts as were specially extended to such. And as to such as were not so extended, we have seen that they were never in force at all beyond the realm. It is, at least, clear that nothing can be inferred—from what, after all, may have been but an abundant cautiousness,—to the prejudice of the rules of application before stated.

On the effect of those rules, as to the laws respecting religion, passed before the Reformation, it is hardly necessary to say a word. It has been decided, that the laws of mortmain, from Magna Carta downwards, have no effect whatever within the colonies of the British crown. The colony of Grenada, after conquest by the British from a Catholic power, seemed to afford peculiar reasons for the application of a law which was said to strike at superstition. But this argument was quite discountenanced by the court, and Sir William Grant decided against the applicability contended for (*k*).

That the disabilities of alienage do not apply within, at least, the conquered or ceded dominions of the British crown, has also been expressly decided. In a late case (*l*), the testator was a French officer, who had settled in British India subsequently to its conquest, where he afterwards died, leaving a very large amount there of real and personal estate. Lord Brougham, for the judicial committee of the privy council, determined that the right of succession to the testator was in no way affected by the circumstance of his being an alien; the English law on the subject not having been introduced into British India, either by express enactment, or by an introduction of

(*k*) *Att. Gen. v. Stewart*, 2 Mer. 156.

(*l*) *Mayor of Lyons v. The East India Company*, 1 Moore, 272.

such other parts of the English law as would draw the law of aliens along with it; and not having an inherent application there. The practical benefit of this decision may be of no small value hereafter, upon a question arising as to lands held within a ceded territory upon charitable trusts, by aliens,—ministers of the Roman Catholic Church,—but who have not been naturalised in accordance with English law and practice.

Upon the same principle as that which excludes the operation of the Mortmain and Popery Acts, it is equally clear that neither the statutes of provisors nor those of premunire can possibly have an inherent applicability to such of the possessions of the British crown as do not form a part of the United Kingdom.

In fine, the status of Roman Catholics within our conquests must be governed by the pre-existing law of that place, until it has been altered by the conqueror. If the local legislature of any of our colonies has thought fit to enact laws affecting the status, and they have not been disallowed in England, they bind that particular colony. Such of the English acts as are expressed to extend to the dominions of the crown generally, are in force within such only of the British dominions as were actually held by the crown at the several periods of their enactment. But subject to these qualifications the rule is broad and clear. The status of Roman Catholics in all our present possessions, lying without the realm, remains precisely what it was before the passing of a single act upon the statute-roll. The common law alone defines and ascertains it. And the common law of England, which is only common reason or usage, knows of no molestation for even erroneous opinions concerning religious belief, or rites or modes of worship. Bare nonconformity is no sin by the common law (*m*).

(*m*) Per Lord Mansfield, in *Evans* — Burn's Eccl. Law, 218.
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